No. 2178

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAKE M. SHANK,

Plaintiff in Error,

vs.

THE GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Idaho.

FILMER BROS. CO. PRINT, 330 JACKSON ST. S. F., CAL.

Reports of U.S. Circuit Court of Appeals

769

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INDEX TO PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

W. P. GUTHRIE, Esq., Twin Falls, Idaho,
ALFRED A. FRASER, Esq., Boise, Idaho,
Attorneys for Appellant.
J. F. NUGENT, Esq.,
S. H. HAYS, Esq., Boise, Idaho,
Attorneys for Appellee.

In the Circuit Court of the United States, Central Division of the District of Idaho.

JAKE M. SHANK,

Plaintiff,

vs.

GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY,

Defendant.

Second Amended Complaint.

Comes now the plaintiff, and for cause of action against the defendant alleges:

1.

That the plaintiff is a resident and citizen of the State of Idaho, residing in Twin Falls County in said State, and that the defendant, the Great Shoshone & Twin Falls Water Power Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and a citizen of the State of Delaware, and doing business in the State of Idaho, and in the county of Twin Falls in this State.

2.

That the matter in dispute in this action exceeds,

exclusive of interest and costs, the sum or value of Two Thousand Dollars ($2,000).

3.

That the defendant was, on the eighth day of August, 1910, the owner of, and did operate, manage and control, a certain electric light and power company, with its machinery, poles, wires and appliances in said Twin Falls County, State of Idaho, and the defendant on said date, in said county, in the pursuit of its said business, had the ownership, management and control of a certain line of [1*] electric wires extending through and along said public roads and highways in said county, one section or portion of said line extending through and along that certain public road or highway lying along and adjacent to the following described land, to wit: The southeast quarter of section thirty-one (31), township nine (9), range fifteen (15) east of the Boise meridian, the lands of said plaintiff herein, along which said road or highway said line was suspended by poles at about the height of thirty (30) feet from the ground, except at the point on said highway where the accident hereafter referred to occurred, and at said point said line was suspended at a height of only twenty-seven (27) feet and was suspended so close and adjacent to said travelled or center portion of the highway as to render it, said highway, unsafe and dangerous to persons travelling thereon.

4.

That said defendant on said eighth day of August, 1910, and for a time prior thereto, had been ac-

*Page number appearing at foot of page of original certified Record.

customed to, and did use said line of wires for the purpose of furnishing light and power to buildings and for other purposes, and to that end was accustomed, and for some time had been accustomed, to pass, and on *said did,* pass through said line of wires, through each and every wire of said line, a strong and powerful current of electricity, dangerous to the life of any human being who might come near to or in contact therewith.

5.

That at the time the defendant so placed its wires along said road or highway it well knew that persons would travel over and along said highway adjacent to and in close proximity of said wires, and it was the duty of said defendant to keep said wires safely, securely and completely insulated, and suspended at a height of not less than thirty-five (35) feet from the ground, and to use every safeguard and device so that persons travelling along and over said [2] highway should not be injured by contact therewith, or by the escape of electricity therefrom; but that said defendant notwithstanding such knowledge and disregarding its duty in the premises carelessly and negligently maintained the said wires at a height of twenty-seven (27) feet from the ground, and carelessly and negligently suspended the said wires so close to the center or travelled portion of the highway as to make it unsafe and dangerous to persons travelling thereon, and carelessly and negligently protected the same by defective insulation, and carelessly and negligently failed to protect and cover said wires with safe and sufficient insulating material.

6.

The plaintiff complains that on the day and date aforesaid, while the plaintiff was lawfully travelling and driving along and over said public highway a certain conveyance or vehicle, known as a haystacker or derrick, said haystacker having a tower or derrick projecting thereon to a height of about twenty-seven (27) feet, with a wire cable attached thereto and running from the top of said derrick to the bottom of the platform of said haystacker; that on said date and while said haystacker was being driven over and hauled along said highway adjacent to the lands of plaintiff hereinbefore described, the top of said derrick came in close proximity to the wires of said defendant, which at said time were heavily charged with electricity by the defendant, its agents and servants, with a strong and powerful current of electricity, dangerous to the person of any person who might come near to or in contact therewith, said current of electricity escaped from said wires of the defendant over to and upon said derrick and haystacker, or to the wire cable attached thereto, and while said plaintiff was at the time walking along the side of said haystacker and in close proximity to said wire cable, and without any fault, carelessness or negligence upon his part, he [3] received said current of electricity into his body, through and by means of which he, the said plaintiff, was greatly shocked, burned, hurt and wounded, maimed, sick, sore and disordered and that he suffered severe pain, both physically and mentally, by reason of said shock, and that the flesh on his hands was burned, blistered

and destroyed to such an extent as to render one of his hands useless; that the flesh was burned or torn off the toes of his feet; part of two toes being torn off the left foot and the bottom of the right foot burned out and the little toe torn off and part of another toe taken off; that said injuries received by plaintiff are permanent, and his entire nervous system, by reason of said shock, is unbalanced, causing plaintiff much discomfort; that plaintiff is, and will be, unable to do any hard work in the future, and that before the accident he was a strong, healthy man. That vehicles or haystackers the same as or similar in character and construction to the one heretofore mentioned and described, being in common use in the immediate vicinity where said accident occurred, and in the surrounding and adjacent country thereto, and being frequently transported from place to place along and over the highway where said accident occurred in the same manner and method as the one mentioned herein was being transported at the time of said accident, and the fact that said haystackers were being so transported along and over the said highway mentioned herein was a matter of general knowledge in the community and vicinity where said accident occurred at the time of, and long prior to the erection of said poles and wires by said defendant. That plaintiff has been damaged by reason of said injuries, received as aforesaid, in the sum of Thirty Thousand Dollars ($30,000); that by reason of said injuries so as aforesaid received by the plaintiff, he was confined to his home and bed for a period of two (2) months, and was compelled

to expend and did expend for necessary nursing, medical treatment and doctor's bills, the sum of Seven Hundred and Sixty Dollars ($760.00). [4]

WHEREFORE, plaintiff prays damages against the defendant for the sum of Thirty Thousand Seven Hundred Sixty Dollars ($30,760.00) and for costs of suit and such other relief as he may be entitled to.

W. P. GUTHRIE,

Attorney for Plaintiff, Residing at Twin Falls, Idaho.

ALFRED A. FRASER,

Attorney for Plaintiff, Residing at Boise, Idaho.

State of Idaho,
County of Ada,—ss.

Alfred A. Fraser, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff herein; that he has read the foregoing second amended complaint and knows the contents thereof and that he believes the facts stated therein to be true.

The reason this verification is made by the attorney and not by the plaintiff is that the said plaintiff is absent from said Ada County, the county where his said attorney resides.

ALFRED A. FRASER.

Subscribed and sworn to before me this 3d day of October, 1911.

[Notarial Seal] D. T. MILLER,
Notary Public.

[Endorsed]: Filed October 3, 1911. A. L. Richardson, Clerk. [5]

In the Circuit Court of the United States, Southern Division, District of Idaho.

JAKE M. SHANK,

Plaintiff,

vs.

GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY, a Corporation,

Defendant.

Answer.

Comes now the defendant, answering the second amended complaint herein, and says:

1.

Admits that it is a corporation organized and existing under the laws of the State of Delaware and duly authorized to do business in the State of Idaho.

2.

Admits that on the 8th day of August, 1910, and long prior to and since said date, defendant was the owner of and did operate, manage and control a certain electric light and power company with its poles, wires and appliances in Twin Falls County, State of Idaho, and that defendant at said time and times, and in said county, had the ownership, management and control of a certain line of electric wires extending through and along the public roads and highways in said county, and that one section or portion of said line extended along that certain public road or highway, along and adjacent to the lands described in the complaint.

3.

Admits that said wires were suspended by poles at

the height of thirty feet or more from the ground. [6]

But defendant states that it has no knowledge, information or belief sufficient to enable it to answer as to the height of the said wires at the place of the accident referred to in the complaint for the reason that the exact place of the occurrence of said accident is unknown to defendant and that owing to variations in the surface of the ground, the height of the said wires from the surface of the ground varies at different places, and affiant therefore denies that said wire mentioned in the complaint was at a distance of only twenty-seven (27) feet from the surface of the earth or that it was any less distance than thirty (30) feet from the surface of the earth at the place of said accident.

3.

Defendant denies that said line was suspended close to or adjacent to the traveled or center portion of the said highway or in such manner as to render said highway unsafe or dangerous to persons traveling thereon or to any persons whatever, but, on the contrary, defendant avers that said line was constructed along the north line or boundary of said highway and within one (1) foot thereof in such manner and at such places as not to incommode the public use of the road.

Defendant further avers that the place of accident was upon a county road or highway and not within the limits of any city, town or village, either incorporated or unincorporated.

Defendant admits that at the time alleged in the

complaint that defendant was using said line of wires for the purpose of furnishing light and power to buildings and for other purposes for the use of many hundreds of persons, and was accustomed to and did pass through said line of wires a strong and powerful current of electricity that might be dangerous to persons coming in contact therewith but not otherwise. [7]

4.

Defendant denies that it knew or had cause to know at the time it placed its wires at the place alleged in the complaint that persons would travel over and along said highway adjacent to or in close proximity to said wires.

Denies that it was the duty of defendant to keep said wires insulated in any manner or at all, and denies that it was the duty of defendant to keep said wires suspended at a height of not less than thirty-five (35) feet from the ground, or at any height in excess of eighteen (18) feet above the ground.

Denies that it was the duty of defendant to use any safeguard or device to prevent the injury of persons traveling along said highway.

Denies that defendant disregarded its duty in the premises or that it carelessly or negligently suspended said wires at a height of twenty-seven (27) feet or at any dangerous height, either so close to or so near to the center or traveled portion of the highway as to make it unsafe or dangerous to persons traveling thereon, or that it suspended said wires either near or close to the center or the traveled portion of the highway at the point alleged in the complaint.

Denies that defendant carelessly or negligently protected said wires by defective insulation, or that it carelessly or negligently failed to protect said wires with safe and sufficient insulating material.

5.

That except as herein specifically denied, defendant has no knowledge, information or belief sufficient to enable it to answer the allegations contained in paragraph six of the second amended complaint herein and therefore, denies each and every of the allegations [8] therein contained (except as hereinbefore specifically admitted), and further denies that *defendant* was injured by bringing said haystacker in close proximity to the wires of defendant. Denies that said accident occurred without fault, carelessness or negligence upon the part of plaintiff.

Defendant denies that vehicles or haystackers the same as or similar in character or construction to the one mentioned in the complaint were in common use in the immediate vicinity where said accident occurred, or in the surrounding or adjacent country thereto, or that they were frequently or otherwise or at all transported from place to place along or over the highway where the accident occurred, in the same manner or method as the one mentioned in the complaint or otherwise.

Denies that the fact of said haystacker being so transported along said highway was a matter of general knowledge or otherwise, in the community or vicinity where said accident occurred either at the time of or prior to the erection of defendant's poles and wires, or any other time.

Denies that *defendant* has been damaged in the sum of Thirty Thousand ($30,000.00) Dollars, or in any other sum, or at all, and that defendant has no knowledge, information or belief sufficient to enable it to answer whether plaintiff has paid out any sum whatever for nursing, medical treatment and doctor's bills, and therefore denies the same.

Further answering, defendant alleges that said wires mentioned in the complaint are strung on poles along the public highway in a proper, sufficient, careful and workmanlike manner, in front of and adjacent to the farm of plaintiff at the point where the accident occurred; that the poles are set along the north boundary of the said highway as hereinbefore alleged.

That at the time of the accident alleged, and for a long time [9] prior thereto, plaintiff well knew and had notice and knowledge of the location of said poles and wires, and of the fact that said wires carried a powerful and dangerous current of electricity.

That at the time of the accident alleged in the complaint, said plaintiff was engaged in transporting an unusual structure or machine of great and unusual height called a haystacker, along said highway, said structure being of a height of twenty-seven (27) feet or over, and that while so transporting said structure or machine, as aforesaid, plaintiff carelessly, recklessly and negligently caused some part of said haystacker to come in contact with the wires aforesaid and that plaintiff, without due or any care or caution, negligently, carelessly and recklessly brought himself in contact with said haystacker, or some part

thereof at said time of contact, and that such injuries or damage as plaintiff may have suffered, if any, were caused by his own careless, reckless and negligent acts as aforesaid.

WHEREFORE, defendant prays that it be hence dismissed and that it have judgment for costs.

S. H. HAYS,
Attorney for Defendant.

State of Idaho,
County of Ada,—ss.

S. H. Hays, being first duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be on information or belief, and that as to those matters he believes it to be true.

That this verification is made by affiant, who is the attorney for the defendant herein, for the reason that all of the officers of the defendant are absent from Ada County, where affiant resides.

S. H. HAYS.

Subscribed and sworn to before me this 16th day of November, 1911.

[Notarial Seal] P. MARTIN,
Notary Public.

[Endorsed]: Filed Nov. 16, 1911. A. L. Richardson, Clerk. [10]

In the District Court of the United States, Southern Division, of the District of Idaho.

JAKE M. SHANK,

Plaintiff,

vs.

GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY, a Corporation,

Defendant.

Judgment.

The above-entitled action came on regularly for trial on the 1st day of March, 1912, the plaintiff appearing by his counsel, A. A. Fraser, Esq., and W. P. Guthrie, Esq., and the defendant by its attorneys, S. H. Hays, Esq., and J. F. Nugent, Esq.

A jury of twelve persons was regularly impaneled and sworn to try the case. Witnesses on behalf of the plaintiff were sworn and examined and the plaintiff rested, and thereupon the defendant, by its counsel, moved the Court for a nonsuit upon the following grounds:

I.

Because the plaintiff has failed to show that defendant company was guilty of any negligence causing the injuries received by plaintiff.

II.

Because the undisputed testimony of plaintiff himself shows that he was chargeable with contributory negligence, precluding his recovery.

III.

Because the uncontradicted evidence introduced

by plaintiff shows that he was chargeable with contributory negligence, barring [11] his recovery.

IV.

Because it appears from the uncontradicted evidence on the part of the plaintiff that he was a trespasser on the property of the defendant company at the time he received the injuries complained of.

Which said motion was argued by counsel for the respective parties and after being duly considered by the Court was by the Court sustained and the said jury discharged from the further consideration of said cause.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff take nothing by his action herein, and that he go hence without day, and that the Great Shoshone & Twin Falls Water Power Company, a corporation, the defendant herein, do have and recover of and from said plaintiff, Jake M. Shank, its costs and disbursements herein expended and taxed in the sum of $560.17.

Judgment entered March 2, 1912.

[Endorsed]: Filed March 2, 1912. A. L. Richardson, Clerk. [12]

In the District Court of the United States for the District of Idaho, Southern Division.

JAKE M. SHANK,

Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY,

Defendant.

Bill of Exceptions.

Be it remembered that on the first day of March, 1912, the above-entitled action came on to be heard before the court, and a jury, duly empaneled, W. P. Guthrie and Alfred A. Fraser appearing as counsel for the plaintiff, and S. H. Hays and F. J. Nugent as counsel for the defendant; and that thereupon the following proceedings were had:

[Testimony of Jake M. Shank, on His Own Behalf.]

JAKE M. SHANK, called and sworn as a witness on his own behalf, testifies as follows:

Direct Examination.

I am the plaintiff in this action and reside at Twin Falls. On the 8th day of August, 1910, I was living on my ranch one-half mile east of Buhl. My ranch borders upon the highway. I know where the line of electric light wires and poles of the Great Shoshone & Twin Falls Water Power Co. runs along in this vicinity. The poles are set just outside my fence line running east and west in the road. I received an injury on that date by receiving a shock

(Testimony of Jake M. Shank.)

of electricity from their wires at a point probably six [13] hundred feet from the southeast corner of the place. This was on the 8th day of August, 1910. I was at the scene of the accident two weeks ago to-day or yesterday, in company with Mr. George Harlan, Mr. Bybee, W. H. Harvey, and two or three other parties. Mr. Bird was there the week before. I was with Mr. Bird at that time. At the time I was there with Mr. Bird the wires and poles were in the same condition, as far as I could see, as they were at the time I received the accident. There hadn't been any new poles set that I could see on the line and the line hadn't been heightened any. As far as the wires were concerned, they were the same as on the date of the accident and during all the times that I had been there that same condition existed.

[Testimony of Elmer Bird, for Plaintiff.]

ELMER BIRD, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

I reside at Buhl and have lived there nearly fourteen months. My business or occupation is that of a civil engineer. The first three years of my college course was electrical work. In a theoretical way I am familiar with electrical engineering work and I am a civil engineer.

(A certain tracing was thereupon marked Plaintiff's Exhibit "A" for identification and the same shown to the witness.) Witness testifies in regard to Exhibit "A" as follows:

(Testimony of Elmer Bird.)

That is a tracing, the result of our work when I visited the place in company with Mr. Shank and made a survey; the result of my work in surveying the point of the accident, the height of the wires and the height of the poles, the location of the bridge and also the location of the wheel tracks on the outside portion of the road. There were present with me when I made this survey, Mr. Shank, the plaintiff, Mr. Guthrie, Mr. Harvey, and some man [14] that was working for Mr. Shank. Mr. Shank pointed out to me the place where he claimed the accident took place. I made this from an actual measurement upon the ground.

(Said plat, Exhibit "A," was thereupon admitted in evidence and the word "Admitted" was stamped thereon.) Witness continuing, testified as follows in regard to said exhibit:

It was drawn to a scale of ten feet to the inch.

(At this time counsel for the plaintiff produced a paper marked Plaintiff's Exhibit "B" for identification and the witness continuing, testified in regard to said Plaintiff's Exhibit "B" as follows:)

That is a profile of the ground surface in relation to the height of the poles and wires at the point of the accident. It was made by myself from actual measurements taken by me on the ground. It is a correct representation of the measurements which I made with one exception, that there is no sag considered in the wires. I considered the wires in a straight line between the top of each insulator, because I couldn't determine the sag of the wire; that

(Testimony of Elmer Bird.)

is, the sag of the wires as they actually existed is not shown here. It is shown in a straight line.

(Whereupon Plaintiff's Exhibit "B" for identification was offered in evidence, admitted in evidence and the word "Admitted" was stamped thereon. And the witness continuing, testified as follows:)

Plaintiff's Exhibit "B" is supposed to represent the ground line of the road. This rough line here (indicating) represents the ground line down the road. The elevation is drawn to scale. It is on a definite scale straight through. The red lines at the top represent your neutral wire, and these are the two bottom wires the electric power wires. I made a measurement of the height of these wires from the ground at different points. At point A the [15] wire was practically 29½ feet from the ground according to scale. At point B it was just about thirty feet and six inches, I should judge from the scale. At point X the wire was 27 feet and six inches, that is not considering the sag. If the wire were drawn straight across at that point the height would be 27 feet and six inches. The point C is the timber bridge across an irrigating ditch at that point. The depression which is shown at point C is the ground line at the bottom of the ditch. There is quite an elevation of the ground from point A to point X. It is going down hill pretty rapidly there, practically five feet in drop in about 125 feet of distance. In other words, the point X would be about five feet higher than the point A; the contour of the ground, the elevation at

(Testimony of Elmer Bird.)

that point. The three little wires as shown on the top of exhibit "A" represent the three wire transmission line of the power company. The line marked A–A is the line of the wheel tracks on that side of the road at that point. I have reference to the wheel tracks as they were when I saw them at the time of the survey. The bridge is sixteen feet wide approximately. The black line represented by dots is drawn to represent the barbed wire fence which is Mr. Shank's property line. It is about two feet approximately from the place I have marked "outside wheel track" to the barbed-wire fence. In traveling up what I have marked the main traveled road, those red wires are suspended over that traveled part of the road. A loaded hay-rack extends clear under it because the fence at this point is knocked down, that is, the wheel track on the outside of the bed of the box would be probably eighteen inches.

Mr. NUGENT.—It is understood, Mr. Fraser, that the testimony of this gentleman is as to conditions as he found them there at the time he made that survey?

Mr. FRASER.—Yes, sir.

Mr. NUGENT.—And not as to conditions at the time of this accident **[16]** as far as his testimony is concerned?

Mr. FRASER.—He has testified as he found it when he was there.

Witness then continues:

The distance between points B and B marked on

(Testimony of Elmer Bird.)

exhibit "A" is just about two hundred five feet. That is from memory, it may not be definite to a foot. That represents the distance between two poles of the defendant company. At the time I was there none of these wires were insulated. We measured the height of the poles for an interval of either four or five poles west of this point and one pole east. They were varying from 29½ feet to the top of the bottom wire up to 31 feet. I found no other place which I measured where the wire was as close to the ground as it was at the point marked X, 27 feet 6 inches.

Cross-examination.

I am twenty-six years past and have been engaged in the civil engineering business nearly six years in and around Boise most of the time. I have been in Oregon and Wyoming both. At the time I made the measurements to which I have testified, I do not know of my own knowledge whether or not the same conditions existed as existed at the time Mr. Shank received his injury. I do not know whether the bridge which is depicted in exhibit "A" was in the same condition on August 8, 1910, when Mr. Shank was injured as it was when I made the survey. I was not in the country at that time. The electric light pole at or about the end of the line marked A on Plaintiff's Exhibit "B" is 30.07 feet from the ground. I believe I stated it was 28.

Redirect Examination.

It is not possible from an engineering standpoint to change the bridge on that ditch to any great

(Testimony of Elmer Bird.)

extent. The ditch is very flat at that point. The bridge would have to be practically in [17] the same location ever since the ditch was there. It would be my opinion that the ground is such that the bridge could not be lowered. I have notes here of the actual measurements of the height of five poles. There is one, as I have stated, that is 30.07—the one marked A. A and B are the same. The next one is twenty-nine six, that would be one west of B. The next one is 31.6, that is the second one west and the last one is 30.9, all going west.

Recross-examination.

I made no measurements, but I think these poles are about 14 inches from Mr. Shank's fence. When I stated that the height of the pole on the exhibit at the point marked "A" was 30.07 feet, I made a mistake. I meant that that was the height from the ground to the bottom wire, not the height of the pole. I made no measurements for the purpose of ascertaining the height of the pole from the ground. The bottom wire is 30.07 feet. All the measurements that I made were to the bottom wire. I don't understand the question to ask what the height of the pole was, but the height to the bottom wire. In arriving at the height of the wire from the ground I took it by triangulation. I did not measure the distance at the point marked X on Plaintiff's Exhibit "B" from the ground to the wire on account of the sag. I wouldn't take any chances throwing a chain up over the wire. The distance, 27 feet six inches, is not the measured distance, it is the distance

(Testimony of Elmer Bird.)

between the elevation of the ground at that surface and the wire, considering no slack in the wire. I don't know, and the plat, Plaintiff's Exhibit "B" doesn't give the distance from the ground to the lowest point on the wire. The point would be lower than that, possibly two or three inches—two or three inches lower than 27 feet and 6 inches; that is just a guess. I did not take any measurements from the point on the [18] bridge that is shown on Plaintiff's Exhibit "A" to the lower wires. I had the elevation of the bridge which is shown there. The width of the bridge I would think possibly an inch or two short of 16 feet. The heavy line marked A and B on Plaintiff's Exhibit "B" represents the line of the road. At the point marked X on Plaintiff's Exhibit "B" the road takes a swing, I should judge about twenty or thirty feet before it gets back out again and at any point under the center line of that road where the center of the outside wagon track would be practically under the wire; maybe not exactly, but very close for a distance of twenty or thirty feet. The point marked X on Plaintiff's Exhibit "A" represents approximately the point marked X on Plaintiff's Exhibit "B"; that is a guess; there is nothing definite about that. It was possibly ten feet from the bridge.

Redirect Examination.

If I had taken the actual measurement at point X of the height of the wire above the ground and allowed for sag in that wire it would have been at a less height at that point; as a matter of fact, the 27

(Testimony of Elmer Bird.)

feet 6 inches is somewhat higher than the wire actually is at that point.

[Testimony of W. H. Harvey, for Plaintiff.]

W. H. HARVEY, a witness called and duly sworn on behalf of plaintiff, testified:

I reside at Buhl. On or about the 8th of August, 1910, I was residing immediately across the road from the plaintiff's home. On the day Mr. Shank got hurt by a shock of electricity, I was somewhere in the neighborhood of between two and three hundred yards from the accident when it occurred. I went up to the point of the accident shortly afterwards, within a minute afterwards, I should say. I just came out of the door to go to the buggy and I heard a strange, ripping, roaring kind of noise. I immediately looked in [19] the direction of it and saw a flash and heard the repeated sound. At that time a little boy appeared and yelled for me to come, that Mr. Shank had been killed. When I arrived there Mr. Shank had been released from the cable he was holding on to and he and his hired man were lying on the bridge. I carried Mr. Shank to the buggy and drove him to his home which was about a couple of hundred yards from the scene of the accident and carried him into the house. I remained with him practically the rest of the day. The accident occurred somewhere in the middle of the forenoon. I assisted in undressing him after I took him home. I carried him, with assistance, into the house and put him on the bed. He began beseeching that I take off his gloves and shoes. At that time his

(Testimony of W. H. Harvey.)

hands were cramped and rigid. He had on heavy horsehide gloves. I poured olive oil down in both gloves, took my knife and slit the gloves wherever I could; finally I took them off in that way. His shoes I ripped so as to release them and also cut the socks off. When his shoes were removed the skin from the bottom of his feet was hanging pendant, and as near as I can describe it, a good deal like soot would hang on the bottom of a stove lid, just hanging in shreds and blackened. The left hand was to all appearance perfectly cooked at the time, likewise his right foot. The glove on his left hand was charred for the most part and full of small holes. His body was more or less burned all over but nothing as compared with his left hand and right foot. He was operated on repeatedly for these injuries. I would say that he was operated on for days and days and I was present at every operation. None of his immediate family could bear to stay in the room while these operations were being made; all of them being made without an anesthetic. I believe that there was one where they gave a slight anesthetic. There was skin grafting. I was present and helped in that operation. I held the knife on his thigh while the doctor [20] separated the skin and grafted in several places on his body. He took the skin off his thigh and placed it on his arm. He was not under an anesthetic at that time.

I noticed the haystacker that Mr. Shank was driving at the time of the accident. There was an orchard intervening between me and the scene of the

(Testimony of W. H. Harvey.)

accident which shut off the view of the man and the team, but I could see the top of the derrick and also the electric wires over it very plainly. I am familiar with haystackers of that kind. At the time I first looked and noticed it the boom on the top of that haystacker was horizontal; it was not raised up. At that time I had seen a number of haystackers similar to the one Mr. Shank was driving in that vicinity and around in that country. They were very common. I have noticed them being transported up and down the highways of that country and they were at that time. I have been upon the ground where the accident occurred. I lived between two and three hundred yards from that point. I had driven up and down that road frequently prior to the time of this accident and a good many times since. The haystacker was being driven west along the road at the time of the accident. In driving west along that road it is necessary to pass under the wires of defendant company in order to cross the bridge in the road. It is impossible to go along the road without going under those wires. Mr. Freedhein came to my place last Sunday and requested that I go out and show him where the accident occurred, and I took him over and showed it to him and pointed out to Mr. Freedhein the point. At that time when I was there with him the poles and wires and the bridge and the road were absolutely in the same condition as far as could be discovered as they were the day of the accident. Apparently there had been no change in the wires, poles or bridge since that time.

(Testimony of W. H. Harvey.)

I measured the height of the wires at about the point of the accident. My measurement [21] was 27 feet three inches from the wire to the ground at the point of the accident. From the location of that bridge and ditch it would be absolutely out of the question to lower the bridge. It is a dead lateral as it is and the bridge is at the lowest point and has been ever since I have been there. I was not in the county when the defendant company constructed the line of wires and poles.

Cross-examination.

It will be two years the first of this coming April that I have been in the vicinity of Buhl. I was engaged in the ranching business at that time. I have been admitted to the bar, but do not practice my profession in this State.

The day the accident occurred was an ordinary August day, clear, and I don't remember of any wind blowing. As far as I can recollect, the day was fairly warm and the roads dry and dusty.

I had just stepped on the porch, when I first heard the peculiar ripping, roaring sound. I would estimate that it continued one and two minutes. There were three very distinct explosions and flashes. The explosions and flashes were virtually simultaneous; as quick as I threw my eye up, I saw the flash. I noticed the position of the stacker; it was in plain view. It was horizontal. It is a difficult question to answer whether it was above the wire or below it, for the reason that the flash made a kind of blending of the wires; that is, the electric wire and the cable that

(Testimony of W. H. Harvey.)

ran over the stacker. I cannot answer as to what part of the haystacker came in contact with that wire. I did not make any examination of the haystacker afterwards. The cable, however, was over the top of his arm, ran over the top of the boom, and if there was any contact the electric wire was above the boom. I did not see Mr. Shank or the man with him at the time, or the horses. They had four horses on it, I noticed afterwards. They were standing as I drove up. [22] There was very little intermission between the flashes. I would say an eighth of a second or an eighth of a minute—something like that; just enough to make them good and distinct. It would have to be a guess. I could not tell whether or not the boom was in the same place on this wire after the first flash. I spent two or three months in Buhl in the summer of 1909. I went out to my ranch in April, 1910, a few months prior to the time Mr. Shank was injured. Generally speaking, the same general form of stacker was the style in general use in that vicinity that summer. They generally buy a telephone pole, if they can get one, to make their booms and standards out of. I don't know the length of the boom on these stackers or as to the height of the stacker, only what a person would judge from his eye. I don't know whether it worked on a hinge or not. It would not be my judgment that all or practically all of the stackers in that vicinity at the time Mr. Shank was injured, with the exception of this one of his and another one, had a boom only about eighteen feet in length. There were three

(Testimony of W. H. Harvey.)

or four within operation of my place at that time; within sight of my place. Mr. Metham, on the adjoining place, has a stacker that is similar; whether it is the same or not I cannot answer. I would estimate the height of the mast on his stacker at twenty-odd feet. I would estimate the length of the boom on that stacker twenty-five or thirty. The Hatfield and Bowers people across the Shank place had a similar stacker in sight of my home. I had seen that stacker. I would have to give a guess as to the length of the mast on that stacker. I would estimate it better than twenty feet, and the boom somewhere in the neighborhood of twenty-five and thirty feet. I can't answer as to whether that boom also worked on a hinge. Mr. Sommers had one of a similar kind. The height of the mast on his stacker was approximately twenty-five feet, or somewhere in that neighborhood. The length of the boom the same as the other, somewhere between twenty-five and thirty [23] feet. I can't answer as to whether or not the boom worked on a hinge. Greshaver and Hopson had a stacker with a standard and arms a different style from these, but the same uniform outline. The height of that stacker I would estimate in the neighborhood of twenty feet and the boom twenty feet; perhaps a little more. I can't say whether the boom worked on a hinge or not. Nearly everybody that I know had one similar; that is the outline was similar. I don't know the length of the booms of them or whether they worked on this hinge. Those stackers are not generally kept on the farm. They had to

(Testimony of W. H. Harvey.)

depend on each other for help. They would swap derricks and swap machinery and that necessitated moving back and forth. They practically all had them, either as individuals or as neighbors, community property. I had seen stackers hauled along the road prior to the time Mr. Shank was hurt, I would estimate, ten or fifteen times. I don't know who hauled them. Aside from Mr. Shank, the only other persons I could name whom I saw with stackers on the road would be Mr. Van Hoy and Mr. Mathews. The stacker that Mr. Shank had that day Mr. Van Hoy claimed. I remember three different people that I can name who hauled haystackers along that road prior to the time Mr. Shank was injured. I can't name anyone else. I went on to this ranch in April, 1910. The land there, that is, virtually all of it, was in cultivation in that vicinity at that time. They commenced to cut the first crop of hay that summer between the first and 15th of June. I can't answer whether or not I saw haystackers along the road about that time. All I can say is that it wasn't an uncommon thing to have them go by the house or to pass them on the road. I can answer your question this way, Mr. Nugent, that this particular stacker that year was moved on and off my place for all three crops, this particular stacker. Mr. Van Hoy took it on and off the place on each occasion, he and his man. I saw Mr. Matthews also hauling this same stacker. I saw three men hauling this same [24] stacker there and these are the only three men that I can name now that I saw hauling a stacker.

(Testimony of W. H. Harvey.)

At the time I arrived upon the scene Mr. Shank was lying on the south side of the bridge injured. I noticed where the stacker was. I had to pass it coming to Mr. Shank. There were four horses on it. It was approximately one hundred feet from the bridge. The stacker was not on wheels; it was on a frame, a derrick frame, the usual frame. They were simply dragging it along the road. I do not know the exact point on the highway where the boom on this stacker came in contact with the wire. Mr. Shank was lying on the south side of the bridge which is the side fartherest from the pole-line. He was at the south edge of the bridge. The nearest point to the bridge to the nearest point under the line I would estimate to be five or six feet. At the time Mr. Shank was injured the wagon road ran for a distance directly under the wire in the neighborhood of twenty or forty feet. There is no other travelled way there. This pole-line is between one and two feet approximately from Mr. Shank's fence. Water was turned onto the lands in that vicinity May 11, 1906.

[Testimony of A. F. McCluskey, for Plaintiff.]

A. F. McCLUSKEY, a witness called and sworn on behalf of the plaintiff, testified as follows:

I have resided in Buhl four years on the 6th day of June. I am a physician. I was practicing my profession on or about the 8th day of August, 1910. I was called upon about that date to visit Mr. Shank. Some time along about the middle of the morning I received a very urgent call to make haste to his ranch, and on so doing found the man suffering—

(Testimony of A. F. McCluskey.)

found him—he had been removed to his home by friends in the neighborhood, and his shoes had been removed by the time I reached there. The suffering of the man was simply intense. Without waiting to make much of an examination [25] I proceeded immediately to relieve that suffering so far as possible. I found that ordinary drugs in the nature of opiates were hardly sufficient. It was with the utmost care that we used excessively large doses and eventually numbed the sensibility to a sufficient extent so that it was possible to go ahead and make an examination. Looking at the most extensive injury, apparently, first—in fact, it was very difficult to determine which was the most extensive injury, that on the arm or the feet, for the odor of burned tissue was all-pervading throughout the room. The soles of the feet were hanging in a charred, blackened, burned mass; the toes were distinctly blackened, and the nails were hanging, having been separated by the severity of the shock. This was also true of the fingers of the left hand, and the thumb, likewise a very large mass about the middle of the flexor surface of the large muscles that govern the hand, moving it, bending it in this wise (illustrating). Practically all the muscles that go down to the hand in moving the fingers in the position of grabbing or grasping anything arise in this area pass along where the point of contact was evidently most intense. That was the greatest and deepest burn, as we afterwards discovered. It is never possible in a burn of this type, and wasn't in this case, to determine how much injury to tissue is

(Testimony of A. F. McCluskey.)

done at the particular time. This becomes apparent anywhere from a few days to perhaps two or three weeks later, as was intimated by one of the other witnesses, by the line of demarcation between dead and living tissue. Going a little more into detail on this, it might be said that the nerve supply having been killed by an electric shock, the nerve supply of any tissue, whether it is muscle or building up tissue, or skin, or nails, or what not, that tissue dies, because the nerve supply that enables nature to repair it has been destroyed. Now, how much nerve tissue has been destroyed by an electric shock, as I said before, [26] it is not possible to determine absolutely at that time, and it requires a number of days, to say the least, in order to determine just how much injury takes place. Lest we do more damage than we could do good at the time we removed all dead tissues that we were absolutely certain were dead, this with the patient suffering intensely all the time. No amount of opiate of any kind or description would so deaden the pain that the handling of tissues where burnt nerve ends were exposed—where these little nerve ends were exposed the pain might be likened to the pulling of a tooth where it is constant. There is no amount of opiate or anything else that will take away all of that pain at the time. So that we removed what dead tissue—myself and assistant—and put on a preliminary dressing, giving an extremely poor prognosia. It was impossible to state just how much damage was done. In fact, we didn't consider that the man's life was anyways near safe at this

(Testimony of A. F. McCluskey.)

time, and couldn't say so for a number of days, for the extensive injury, the amount of poison absorbed therefrom, the injury to the red blood cells, due to the shock of the electricity passing through the body, the injury to the spinal column and the brain substance, we couldn't tell how much damage was done.

I am acquainted with the place where this accident occurred. I have passed there a great many times. About the time of the accident I was passing along that road on an average probably of from ten to fifteen times a week. I have crossed the bridge shown in Plaintiff's Exhibit "A" a number of times. The fact of the matter is that it is the best road, and the shape of the bridge is such that in making a turn even in a small, light rig such as I drive, I go under at least one if not more than one, with the north side of my rig in passing along that road. I have been over the road lately and the bridge and wires are in practically the same situation as they were at the time of the accident. [27] There has been no change that I could determine. I first went to that country June 6, 1908. I know what a haystacker is. In a general way, I have noticed a great many of them down in that country. On or about August 8, 1910, I have seen them up and down the public road. It was not at all uncommon to find them moving, in fact, a great many men own land on both sides of the same road, and move them back and forward to the crops.

Cross-examination.

Prior to the time Mr. Shank was injured I had seen different men hauling haystackers along the road as

(Testimony of A. F. McCluskey.)

far west as Section Eight; that is not on this particular road. Just east of this at this particular time there stood for a number of days in the middle of the road, necessitating my going around it, at the farm of Mr. G. N. Davis, about a mile and third east of where this accident happened on the power-line, a stacker of identically the same type and approximately the same dimensions. I don't recall particularly just now who else had a stacker that I saw hauled along that road. It never occurred to me to make note of them at that time, and it don't come to me just at this time. It is my impression that there were a number there, though, and that one particularly, because I had to drive around it a number of times. I never was close enough to the stacker that Mr. Shank had at the time he met with this injury to examine it. I don't know how high the mast of the stacker owned by Mr. Davis was and I am not very shrewd at guessing. Mr. Shank's stood—well, I would pass it close enough, because it stood in the road where the accident happened for a day or two afterwards and I passed it there. I did not examine it particularly; just glancing at it as I drove past in the buggy, the height of the mast. It made no definite impression on my mind; I wasn't interested. I do not know the length of the boom. I do not know how high the mast was on the Davis stacker [28] or the length of the boom on the Davis stacker or whether it worked on a hinge. I do not know of any person in that vicinity having been injured by coming in contact with that wire along the road prior to

(Testimony of H. H. Freedhein.)

the time Mr. Shank was injured. In my judgment, Mr. Shank has been permanently injured to a very great extent.

[Testimony of H. H. Freedhein, for Plaintiff.]

H. H. FREEDHEIN, a witness called and sworn on behalf of plaintiff, testified;

I reside at present at Twin Falls, Idaho. I have resided there five years. My business or occupation for the last number of years has been electrical wiring and construction and contracting. I am an electrician. Beginning from 1888 I have been engaged in the various occupations of electricity for the last—well, twenty-two years. Some of the places in which I have worked following that profession of electrician was the Westinghouse Electric & Manufacturing Company in Pittsburgh; other places are Manitou, Colorado; Leadville, Colorado; Lake City, Colorado; Denver, Colorado; Bingham Canyon, Utah; Provo Canyon, Utah; Eureka, Utah; Tintanic Mining District—I was superintendent there of the local division of the Telluride Power Company. They carried a voltage of 40,000 volts from their transmission lines. I have made a study of the transmission of power along lines in a practical way. I was out on the ground represented in Plaintiff's Exhibit "A" on the 24th of February. Mr. Harvey accompanied me from his ranch to that point. I made an examination of the defendant's lines and wires and poles at that point between those two poles. In the first place I got directly under the wires and I threw this string over, pulled it down as tight as I could and touched

(Testimony of H. H. Freedhein.)

the ground at the point where Mr. Harvey told me that the contact took place. This was at the point marked F on Plaintiff's Exhibit "A." The height of the wire from the ground at that point was 28 feet—I mean the wire next to [29] the fence. The one further out from the road would have been a shorter distance. From the road to that wire it would be a shorter distance than the one measured. Plaintiff's Exhibit "B," to my mind, shows approximately a correct profile of the ground between the two poles. I have had experience in the construction of long distance transportation lines for power purposes at Provo Canyon, at Eureka, Utah, at Bingham, Utah, where we constructed lines for 40,000 volts for 50,000, for 440 volts, 210, 220 and 110 volts. There is a standard recognized by electricians who are in charge or control of the construction of long distance and other power-lines conducting electricity for power and lighting purposes as to the height of the poles that should be used in a country similar to that in which this accident occurred. The standard recognized by engineers and parties in charge of the construction of power-lines such as this is and in a country such as this is, as to the height of the poles that should be used along these highways is from thirty-five to fifty feet, according to the authorities I have seen, and this I know outside of the authorities. It is the practice to use poles about forty feet in length for high tension transmission lines. In the construction of these power-lines poles of different lengths are used, depending on the contour of the country. A country

(Testimony of H. H. Freedhein.)

that is traversed sometimes goes up and down, small variations, and it is the object of using different lengths to keep the top of the wire on a grade to keep it level as much as possible.

Cross-examination.

A forty-foot pole would be practically standard for high tension wire line construction; that means a pole measured from the top to the bottom of forty feet. That pole would ordinarily be put in the ground between six and eight feet, sometimes five feet. That is standard construction for ground that is made of rock or if the earth at that point is rock. If it is ordinary, solid, about five [30] and one-half feet or six feet is not right; six feet is not about right. I have been engaged in this business for twenty-two years, on and off, but this direct question as to the high power transmission lines, I have not been engaged in all that time. Down in Utah I was employed by the Telluride people in keeping in repair as well as to help construct lines fifty miles long. I was the man that kept them in repair to a certain extent. At times I looked after the wires on the line. Sometimes I looked after all the poles that were rotted or needed repair. If I had a forty-foot pole I would put it in the ground about eight feet, probably six, if it was solid. If a pole is seven inches in diameter at the top and forty feet long it is a suitable pole for all voltages across such a country as the one here in question. It is practically a level country. All the variations in the surface are small undulations that come in a comparatively level country. I took no

(Testimony of H. H. Freedhein.)

measurements of the poles. Think a forty-foot pole is standard and I would put it about eight feet in the ground. There are three wires strung on these poles, one on top and two at the sides of the arm, and these are on the cross-arm. It is the general, usual and standard form of construction so far as the wires are concerned. It is a three phase current. They usually put one wire on the top with an insulator on top of the pole, then the cross-arm lower down and an insulator on the top of the cross-arm and wires attached to the insulators. The wires were attached to the insulators, the usual insulators in the ordinary way upon these poles. I don't believe that these are the usual insulators that are accustomed to be used on good construction. I did not go up to look at them. If what I have heard of the voltage being 22,000, I certainly would object to them. I don't know about the voltage on this particular line. Wires range from 42 inches to 72 inches apart in my experience [31] if for high voltage. The lower wires on high voltage of from 22,000 to 23,000 would be put about eighty inches to forty or sixty inches or 72 inches apart, and in good construction the wire on the top is about the distance from these other wires as they are apart. I did not go up to measure or see how these wires were located in that regard. I have Louis Bell's work on the "Transmission of Electrical Energy" with me. I believe that is the title. "Electrical Transmission of Water Powers," I believe, is one of them. I think Hutchinson wrote that, if I ain't mistaken; R. W. Hutchinson. I think that is

(Testimony of H. H. Freedhein.)

the title of the book. Another authority on the subject is Hydro-electric Power Plants. I believe something like that. I don't remember who wrote it. I don't know any of the titles of books in ordinary and common use by electrical engineers; in fact, I don't call any to mind. The "American Institute of Electrical Engineers" is a society recognized by electrical engineers. I am not much familiar with the proceedings of that society. I used to take the "Electrical World," the "Electrical Record" and the "Western Electrician," but they just contained articles and papers read before these societies. Did you ever see the "Standard Hand-book for Electrical Engineers"? I don't remember ever having seen that. I never went to any school of electrical engineering; I didn't even finish the public school. My business in the Twin Falls country has been the installation of electrical wiring in houses for heat, light and power, and in telephone construction for the Rocky Mountain Bell Telephone Company. On a forty-foot pole the first cross-arm might be ten to eighteen inches below the top of the pole. If I was going to have a high-tension wire strung to carry a voltage of 22,000 or 23,000 volts and wanted to put the wires a safe distance apart, I would put the cross-arm thirty to forty inches below the wire on a proper insulator on the top of the pole. Out on [32] the end of the cross-arm I would put a pin and an insulator and for that voltage the top of the insulator would be in the neighborhood of twelve to fourteen inches above the cross-arm. Opinions might differ on

(Testimony of Charles Coker.)

guess. The length of the boom I would approximate at, say, from twenty-five to thirty feet. I can't tell the exact number of people in the vicinity of where this accident occurred who had haystackers during the season of 1910, because they all use stackers, and I haven't had any occasion to make any note of it. I never took any particular notice as to the size of the stackers. I never measured any of them. Practically all of the people that have alfalfa use them. This [34] accident occurred on one of the new irrigation projects, the Twin Falls Carey Act project. Water was turned on in that locality sometime in April, 1906, for the first time. Before that, it was all sagebrush; just a little wheat crop was raised that year, mostly. In 1907 they raised a little grain and started on alfalfa. In 1908 they raised alfalfa and grain. That was about the first year they had anything to speak of in the way of a crop of alfalfa. I never took any particular notice as to the size of any of these haystackers.

[Testimony of F. E. Chamberlain, for Plaintiff.]

F. E. CHAMBERLAIN, being called and duly sworn on behalf of the plaintiff, testified:

I reside at Twin Falls. I have resided there since the fall of 1905. I have been engaged in ranching since I have been in Idaho. I am acquainted with the location shown on Plaintiff's Exhibit "A." I have been along this road a great many times. I have a ranch just west of there a little way. I have crossed this bridge a great many times. In driving west along the road to cross over the bridge it was neces-

(Testimony of F. E. Chamberlain.)

sary to pass under the wires of the defendant company in driving by them on and off of that bridge. I know what is known as a haystacker. I have seen a good many of them. I have seen them around the vicinity of the bridge and various places on the tracks since 1906. I have seen them on the highways at that time and both prior and since.

Cross-examination.

They raised a good many crops there in 1907. In 1908, I should say, that there was fifty per cent of the land in cultivation. Early in the history of the tract, it was mostly grain crop. About 1907 was the beginning of alfalfa to any amount in that vicinity. In 1908 I should say half of the country was in cultivation. In the beginning, they didn't need any haystackers. As the country grew up it became so that more people had their own haystackers. As time goes [35] on it is getting so that more and more people own their stackers. They have what they call the overdraw stacker, also the side-delivery stacker. The stackers that you buy at the implement houses that you don't have any mast on, I would not have them, but opinions differ as to that. There are people who do use them. I took no particular notice of these haystackers in 1906, 1907, 1908, that I saw in the vicinity of this place other than I saw that they were ordinary haystackers that were being constructed there. The stacks of hay have been getting larger as the acreage increases. I never measured any of these haystackers to get their exact dimensions. I simply know the general dimensions of them. On one kind of

(Testimony of F. E. Chamberlain.)

stacker all of the boom is on one side of the mast. There is another kind where about one-third or one-fourth, perhaps, is on one side and two-thirds or three-fourths, as the case may be, is on the other side. When the boom is all on one side of the mast it might be called a rigid stacker. They usually try to get about a thirty-five foot pole for the rigid stacker, whereas a twenty or twenty-five foot pole is tall enough for a boom stacker. The longest pole I know of being used on a haystacker prior to 1910, I should say, was in the neighborhood of thirty feet and with a thirty-foot boom eight or ten feet of it would be on one side of the mast and the balance on the other. I never heard of anyone being hurt at that point except Mr. Shank, either before or since that time.

[Testimony of Jake M. Shank, on His Own Behalf (Recalled).]

JAKE M. SHANK, a witness heretofore duly sworn, on behalf of plaintiff, upon being recalled, testified:

On the 8th day of August, 1910, I was living on my place one-half mile east of Buhl. I live in the neighborhood of two hundred yards west of the bridge shown in Plaintiff's Exhibit "A." I traveled up the road that morning. I left the house and went down after **[36]** the stacker. My hired man, by the name of Moran, went with me. We had four horses hitched on to it. After we hitched on to it we went south under the power-line and up the road west. Before I came to the point where the accident occurred I had passed under the wires of defendant company; the

(Testimony of Jake M. Shank.)

line of wires shown on Exhibit "A." About, probably three hundred yards east I passed under the line. I passed straight along underneath them, and then turned on the road. From the point of the accident it was probably three or four hundred yards down the road where I had crossed under the wires. I had no difficulty in going under the wires at that place. At the time of the accident I was standing on the outside of the derrick—on the south side of the derrick away from the wires. We pulled up to the bridge up the road and stood in the road and I was driving the inside team next to the wire fence and was right up against the wire. The hired man had to pull his team about four or five inches to square the derrick and he had to pull right in toward my team, and I got out from the fence away from the horses and stood on the south side of the derrick, and I stepped outside of the derrick and asked him if he was all ready and he said yes, and just as I said that I threw my arm up and grabbed the manila rope there, and just as I grabbed it there was a flash came and blinded me and the wires swung and hit me on the arm; the wire cable. I was conscious after that, but could not see or could not holler; could not do anything at all. I was hung on to that wire and was drawn up in a knot, you might say. I could feel the electricity going out all over me, and I could hear the popping of the electricity. I could hear the fellow talking to the horses. They were trying to get away from him, and he was at the head of them. When he saw me hooked on to the wire he ran back and he said, "My God, Jake, you

(Testimony of Jake M. Shank.)

are burned up." Then, I felt something take hold of me, give me a jerk, and it threw me inside the derrick. When he left the horses and did that, all [37] four horses started to run. The derrick knocked me down when he jerked me and knocked him on top of me and the derrick dragged us across the bridge and the derrick went over the north end of the bridge and they pulled it off to the right and gave it a tilt and let us out. I got up and walked back on the bridge and fell down. I saw my neighbor up the road and told him to send for Mr. Harvey. I was there when the bridge was constructed and when the defendant company erected its power-line across there. The grade of the road is the same now as it was then and the bridge is in the same place and the same position as it was then. This same derrick passed under those wires at a point east of the place of the accident. I did not pass under them myself, but I was there when Mr. Van Hoy and his hired man took this same derrick out east of this same pole. That was on the 22d day of July, 1910. This same derrick had passed under those wires to my knowledge three times beside those two times which I have testified to. We pulled it out under the wires twice when I was present west of my place, on my place, about, I should say, four hundred yards west of where the accident happened, and Mr. Van Hoy, I have seen pull it out once or twice through there at a different point on the line. On the morning when I brought the derrick out the boom was in a horizontal position. It was fastened in that position; it was tied by the other end. There

(Testimony of Jake M. Shank.)

is two-thirds of it on one end and one-third on the other, so that there is a short end of the boom on one side of the mast and a long end on the other and I had fastened the short end down. We have a rope there that we use to raise and lower the stacker. It was tied at the time of the accident and the boom was horizontal. The highest point of the pole of that derrick is about 27 feet five or six inches, I should say. We measured it. I would not say exactly, but it was some place in there. On top of the pole is something like five feet above the boom where [38] the boom crosses the pole, so that the horizontal boom would be five feet lower than the top of the pole on my stacker. I had passed under the wires and had noticed this derrick pass under it the times I have mentioned and the pole cleared the wires in each case. Mr. Van Hoy built the stacker first; I helped him to remodel it in 1910 prior to the accident. We had been told that the wires were thirty feet above and we had to build some kind of a derrick so that we could get the derrick under the wires without having them taken off and consequently we built the derrick between 27 and 28 feet, so that we would not have any interference, no trouble with it at all. I have lived on my place since about the 15th of April, 1906. Prior to August 8, 1910, the time of my accident, I had seen haystackers similar to mine in that vicinity. I had seen them transported up and down the highways in that vicinity.

Cross-examination.

I went onto my ranch before the power-line was

(Testimony of Jake M. Shank.)

constructed and was there when it was put up. The defendant company's line of poles is just outside my fence, practically against the fence. At the time I went on my land I don't know whether this road was accepted by the county but then the road was established when I went there; they were using it as a section line. The company had put up the posts and they had made it the main travelled road at that time. I had to go under these wires in order to get into my place. I saw this pole-line frequently. I knew the wires were there and I saw them very frequently. I also knew that they were charged with electricity and that they were dangerous. That line was constructed into the town of Buhl. The town is electric lighted by this company by electricity carried over this line, and I knew that at the time of the accident and for a long time prior [39] thereto, the wires on the poles were a little higher than they were between the poles, as there was a little sag in the wires between the poles. Prior to the time of the accident I had never made any measurements to ascertain the height of these wires from the ground at any point along this line. This road is supposed to be fifty feet wide from fence to fence. The north side of the road had a point where you make a turn to go on to the bridge goes right up against my fence. The main travelled part of the road is graded right to the fence. It is the only way you can get on the bridge and you have got to travel that. The haystacker is built on a frame, and I think it is about fourteen feet wide and the frame is about fourteen

(Testimony of Jake M. Shank.)

feet long. The piece on which it stands, I think is made out of six by eight. It would be eight inches high. There was nothing under the base of this haystacker at the time I moved it on the day of the accident only the skids that it was on. Just as I told you, they were six by eight. It is made in a skid; the pieces were sixteen feet long and they were sloped at both ends so that you could pull it back and forth like the runner of a sled. The upright mast was about 22 feet. In the center of the flat part were two pieces 4x6 and the upright boom, and from the ground to where the mast went across was about 22 feet. The boom works on a hinge. The boom was a pole about thirty or forty feet long and it was, perhaps, twelve or fourteen inches through; I would not say. That would be a guess. On the top of this boom that went across the top of the mast there was another little upright that was used to hold the guy wire that went across the top.

Defendant's Exhibit No. 1 is a picture of the same derrick, the one in question.

(Defendant's Ex. No. 1 admitted in evidence.)

[40]

(Witness handed another photograph.)

I think that this is a picture of the bridge taken at the same time, taken going west coming from the east. This picture here is a photograph of the scene of the accident as it was at the time of the accident, that is, as near as you could get it, I guess. It was taken below the point where the accident happened, so that the accident happened at the point

(Testimony of Jake M. Shank.)

shown in the picture.

(The picture offered in evidence as Defendant's Exhibit No. 2 admitted.)

I mean by 27 or 28 feet the top of the derrick from the ground up. The long end of the boom is moved up and down in stacking operations by means of this rope on the other end. There is a hinge whereby the pole moves up and down to accommodate itself to the varying height of the stacker. The material in the piece running from the top of the pole was a wire cable. From A to B on Exhibit No. 1 there was a wire cable running across the top. I would say it was in the neighborhood of a half inch in thickness. The bottom or piece on which the structure stood was about fourteen feet square, but the skids were sixteen feet pieces of timber; they stuck out a little further on the ends. The length of the wooden boom from A to B was 38 or 40 feet; I could not say. The other end of the boom was 12 or 13 feet over in the direction of A from the mast, supposed to be about one-third of the total measurement. The boom was a pole of the same character as a telephone or electric light pole. On the 8th of August, the day of the accident, the road was dusty.

Photograph No. 2 was taken about 100 feet down from the bridge from where I was hurt, anyway, 100 feet. On the south side of the stacker away from the electric light line, and I was not touching the frame at all. The accident occurred approximately at the bridge a few inches off. The south

(Testimony of Jake M. Shank.)

corner was a few inches to the south and east of the bridge. We didn't have our derrick **[41]** squared up, squared on to the bridge. You have to hug the line to get on the bridge and you have to get up there and drive as close as you possibly can and the derrick just fits on the bridge nicely when it is on there. We had to be very particular. When you pull up to the bridge you have got to be particular not to get off to the south of the bridge. On the south end of the bridge it probably lacked five or six inches of being to the bridge; that is, it did not get up to the bridge yet. It had not squared around. We were going to square the south end of the bridge and then we were going to drive my team on the bridge and he could hold his team and I could pull my team on the bridge and square it and take it across. My team was over on the north side, but I stood on the south side. I did not have hold of the lines. The team I was driving was on the opposite side from where I was standing. I had gone over to the south side. I was traveling west and came up to this point and found myself near the fence. I let loose of the lines and went over to the south side. The other man was standing on the bridge in front of the derrick. He had hold of his team by the heads. He was not guiding my team; my team would have to be quieted; he had to pull his team about six inches to square it on to the bridge. He pulled the north end up to the bridge; he had to pull his team up and hold it there until I pulled my team on to the bridge. That is the only way we

(Testimony of Jake M. Shank.)

could get on to the bridge because both teams could not square it on to the bridge at the same time. There were four horses abreast. I was driving one team and he the other. I was fastened on the one corner and he to the other. The base of the stacker was about as big as the bridge within a foot or so. At the time of the accident I was standing off to the side of the derrick as near as I can tell at the point marked S on Exhibit "A." I was standing about the point marked S and I was facing north. My body was facing north. I was looking in that direction when I received the shock. Just before that I was looking [42] at the bridge and I asked my man if he was all ready to pull, if everything was all right, and he said it was and at that I turned my head away from him, looked up and threw my hand up like that. There was a rope running down on the derrick and I just put my hand on that rope and as I looked up there was a flash came and blinded me and I couldn't see. It was my left hand I reached up. I just threw it up like that and caught hold of the rope and the cable hit me in the arm, as far as I know. It was a manila rope. Just as I turned around and started to look the flash came. I turned to the north away from the man with the team and facing the north and I threw my hand up on this rope. I looked up to the rope like a man naturally would if he was going to take hold of anything and just as I grabbed hold of it the flash came and the cable struck me and blinded me and I could not speak or see anything; I was drawn into a knot.

(Testimony of Jake M. Shank.)

I could not see. I could hear people talk. I heard him trying to quiet the horses. I was getting ready to square this around. The horses had never moved to my knowledge. They might have, but I did not know because it all happened so quick I could not tell. No flash had happened before that. I had used this stacker before this accident. I have helped stack two seasons' crop with it. I had not moved it along a country road before. I had helped Mr. Van Hoy and his man at the time they took it from my place in the spring over to Mr. Harvey's place and remodelled the derrick. On the second cutting of alfalfa hay the stacker was down on my field, to the east of that bridge, and Mr. Van Hoy and his man came over and started to get the derrick, and I walked down toward them and they took it out east of this first pole, right east of where I got hurt, took it out between that pole and the next pole and started to cross this bridge. This was not at the time the accident occurred. I moved it along the road on this day before I got to the bridge. The derrick had been borrowed by a man by the name of Matthews and I drew it back **[43]** and left it in the public highway, and I had to cross under the electric light wires when I had it. I crossed under these wires, came right up here and met with the accident. The derrick was in the same position when I crossed under here as it was then. I do not know just how many feet of this bridge it was that I crossed under the wire. It happened in the same forty. It was probably eight or nine hundred feet, maybe shorter, maybe a little

(Testimony of Jake M. Shank.)

more. There is a road coming out at the point where I crossed under the wires; a public highway. There was an electric light pole near there just a few feet from the road crossing, and we followed the road. The boom was running east and west and *the so* was the derrick. It was running back right across east and west and the derrick was running east and west and the boom was following. It was extending back, when I swung the stacker around to cross the bridge. When we turned the long end of the boom would swing out over the field from my wire fence and under the electric wires. I was not watching the boom as I went along fence there. I was watching my team and couldn't very well watch the team and the boom, too. The photograph, Defendant's Exhibit #3, shows the location of the bridge looking from the west to the east. It shows also how you had to come up across here and around into my barbed wire fence before you made the turn to the road, up close to the fence.

(Defendant's Exhibit #3 is admitted in evidence.)

Redirect Examination.

The defendant company has never paid me anything by reason of the injuries received. I did not make any request of the company to pay me for my injuries.

(Witness examined by the COURT.)

Just before the accident occurred I caught hold of the hemp rope. It was attached to the outside of the stacker on the **[44]** framework. We had three or four ropes. We had two or three ropes on

(Testimony of Jake M. Shank.)

there, and one of these ropes was a loose end rope. It was hanging from the boom; it was attached to this here. It was just on there for emergency to make it stronger or something, and we had a nail or hook on the side of the stacker that came down here and hooked over there. It was hanging suspended from the butt end of the boom. It was attached to this. This is a pulley. It was not attached to the boom, it was into the pulley. The lower end hung suspended. This was a hook in here and this pulley and this rope were attached and it was raised and lowered and tied down here when we needed it. The one I caught hold of was not attached down here. It was an extra rope for use in emergency. At the time of accident or just before, when I spoke of catching hold of this rope, the mast was, practically speaking, perpendicular with the base of the haystacker. The road is not graded, but goes around a curve and the outside is higher than the inside, and, practically speaking, it was straight up and down. It was not perfectly, it was not as even as the road is in there. The outside of the road was higher than the inside.

With the introduction of the above evidence, the plaintiff rested his case.

At this time Mr. Nugent, one of the counsel for defendant, makes the following motion:

Comes now the defendant company, by its counsel, and moves this Honorable Court to grant a nonsuit in this action in favor of the defendant company, upon the following grounds:

1. Because the plaintiff has failed to show that defendant company was guilty of any negligence causing the injuries received by the plaintiff.

2. Because the undisputed testimony of plaintiff himself [45] shows that he was chargeable with contributory negligence, precluding his recovery.

3. Because the uncontradicted evidence introduced by plaintiff shows that he was chargeable with contributory negligence barring his recovery.

4. Because it appears from the uncontradicted evidence on the part of the plaintiff that he was a trespasser on the property of the defendant company at the time he received the injuries complained of.

Said motion was thereupon argued by counsel for the respective parties. At the conclusion thereof the Court ordered that said motion for a nonsuit be sustained and that this action be dismissed, for the reason that the evidence failed to show that the defendant company was guilty of any negligence causing the injuries received by the plaintiff, and second, for the reason that the evidence in this case shows that the plaintiff was guilty of such contributory negligence as precluded his recovery; to which action of the Court in granting said nonsuit and dismissing said action counsel for the defendant then and there excepted, which exception was by the Court allowed.

The above and foregoing bill of exceptions contains all the evidence affecting the matter of which the exceptions relate and all the material evidence produced upon the hearing and considered by the

Court in passing upon the motion for a nonsuit herein.

The above and foregoing record of proceedings is presented as plaintiff's bill of exceptions on appeal herein.

W. P. GUTHRIE,
ALFRED A. FRASER,
Attorneys for Plaintiff. [46]

Service of a copy of the within and foregoing proposed bill of exceptions admitted this 30th day of April, 1912.

J. F. NUGENT,
S. H. HAYS,
Attorneys for Defendant.

The above and foregoing is by consent of counsel for the respective parties hereby settled and allowed by me as the plaintiff's bill of exceptions on appeal herein.

Dated Boise, Idaho, this 13th day of August, 1912.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed August 13, 1912. A. L. Richardson, Clerk. [47]

In the District Court of the United States for the District of Idaho, Southern Division.

JAKE M. SHANK,

Plaintiff,

vs.

THE GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

Comes now Jake M. Shank, plaintiff herein, and says that on or about the 2d day of March, 1912, this Court entered a judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereunto in this case certain errors were committed to the prejudice of the plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals.

ALFRED A. FRASER,
W. P. GUTHRIE,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 20, 1912. A. L. Richardson, Clerk. [48]

In the District Court of the United States for the District of Idaho, Southern Division.

JAKE M. SHANK,

Plaintiff,

vs.

THE GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the plaintiff, Jake M. Shank in the above-entitled cause and assigns errors in the trial and decision of said District Court in said cause as follows:

1.

The said Court erred in sustaining the motion made by counsel for the defendant in error that the Court grant a nonsuit and dismiss said action, and holding that the evidence introduced by the plaintiff failed to prove or tend to prove the cause of action set forth in plaintiff's amended complaint.

2.

The Court erred in holding as a matter of law that the evidence introduced by the plaintiff in the trial of said action established the fact that the defendant was guilty of such contributory negligence as barred his recovery in this suit.

3.

The Court erred in not submitting for determination the issues between the parties to a jury.

4.

The Court erred in taking the case from the jury and directing a verdict for the defendant herein. [49]

Wherefore, the said Jake M. Shank, plaintiff in error, prays that the judgment of the District Court of the United States for the Southern District of Idaho in this cause entered be reversed and that said District Court be directed to grant a new trial in said cause.

ALFRED A. FRASER,
W. P. GUTHRIE,
Attorneys for Plaintiff.

[Endorsed]: Filed August 20, 1912. A. L. Richardson, Clerk. [50]

In the District Court of the United States for the District of Idaho, Southern Division.

JAKE M. SHANK,

Plaintiff,

vs.

THE GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

This 20th day of August, 1912, came the plaintiff, by his attorneys, and filed herein and presented to the Court his petition for the allowance of a writ of error and assignment of errors intended to be urged by him; praying also that a transcript of the record

and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

ON CONSIDERATION WHEREOF the Court does allow the writ of error upon the plaintiff giving bond according to law in the sum of Three Hundred Dollars ($300.00).

FRANK S. DIETRICH,
U. S. District Judge.

[Endorsed]: Filed Aug. 20, 1912. A. L. Richardson, Clerk. [51]

In the District Court of the United States for the District of Idaho, Southern Division.

JAKE M. SHANK,

Plaintiff,

vs.

THE GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation,

Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, Jake M. Shank, as principal, and the National Surety Company, a New York Corporation, authorized to transact a surety business in the State of Idaho, as surety, are held and firmly bound unto the defendant in error, The Great Shoshone and

Twin Falls Water and Power Company, in the full and just sum of Three Hundred and No/100 ($300.00) Dollars, to be paid to the said defendant, The Great Shoshone and Twin Falls Water and Power Company, its certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 20th day of August, A. D. 1912.

WHEREAS, lately at a District Court of the United States for the Southern District of Idaho, in a suit depending in said court, between Jake M. Shank, plaintiff, and The Great Shoshone and Twin Falls Water and Power Company, defendant, a judgment was rendered against the said Jake M. Shank, and the said Jake M. Shank having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Great Shoshone and Twin Falls Water and Power Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in said Circuit, on the 16th day of September, next.

NOW, the condition of the above obligation is such, that if the said Jake M. Shank shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the

above obligation to be void, else to remain in full force and virtue. [52]

Sealed and delivered in presence of

NATIONAL SURETY COMPANY.

By L. W. ENSIGN, [Seal]

Attorney in Fact.

Approved by

FRANK S. DIETRICH,

District Judge.

[Endorsed]: Filed Aug. 20, 1912. A. L. Richardson, Clerk. [53]

[Writ of Error.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable Judge of the District Court of the United States for the Southern District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between James M. Shank, plaintiff, and The Great Shoshone and Twin Falls Water and Power Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said James M. Shank, plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the

judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said circuit, on the 16th day of September next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 20th day of August, A. D. 1912, and in the year of the Independence of the United States of America, the one hundred and thirty-seventh.

Allowed by

FRANK S. DIETRICH,
United States District Judge.

[Seal] Attest: A. L. RICHARDSON,
Clerk of the District Court of the United States, District of Idaho. [54]

Service of within and foregoing Writ of Error admitted this 20th of August, 1912.

J. F. NUGENT,
S. H. HAYS,
Attorneys for Defendant.

[Endorsed]: No. 345. In the United States Circuit Court of Appeals for the Ninth Circuit. James M. Shank, Plaintiff, vs. The Great Shoshone and

Twin Falls Water and Power Company, a Corporation, Defendant. Writ of Error. Filed on return Aug. 20, 1912. A. L. Richardson, Clerk. [55]

[Citation.]

The United States Circuit Court of Appeals for the Ninth Circuit.

The United States of America,
Ninth Judicial District,—ss.
To The Great Shoshone and Twin Falls Water and Power Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in said circuit, on the 16th day of September next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of Idaho, wherein James M. Shank is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK DIETRICH, District Judge of the United States, at Idaho, within said circuit, this 20th day of August, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States of America

the one hundred and thirty-seventh.

FRANK S. DIETRICH,
U. S. District Judge.

[Seal] Attest: A. L. RICHARDSON,
Clerk.

Service of copy of above and foregoing Citation admitted this 20th day of August, 1912.

J. F. NUGENT,
S. H. HAYS,
Attorneys for Defendant. [56]

[Endorsed]: No. 345. The United States Circuit Court of Appeals for the Ninth Circuit. James M. Shank, Plaintiff, vs. The Great Shoshone and Twin Falls Water and Power Company, a Corporation, Defendant. Citation to Defendant in Error. Filed on return August 20, 1912. A. L. Richardson, Clerk. [57]

In the District Court of the United States for the Southern Division of the District of Idaho.

JAKE M. SHANK,
Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER AND POWER COMPANY,
Defendant.

Order for Transmission of Exhibits.

IT IS HEREBY ORDERED that the original exhibits offered and received in evidence in this case be withdrawn from the files of this court for the purpose of being transmitted to the Circuit Court of

Appeals for the Ninth Circuit, as a part of the record on appeal in said court.

IT IS FURTHER ORDERED that said exhibits be returned to the custody of the clerk of this court upon the termination of said cause in the United States Circuit Court of Appeals.

Dated August 29, 1912.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed Aug. 29, 1912. A. L. Richardson, Clerk. [58]

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. [59]

In the District Court of the United States for the District of Idaho, Southern Division.

JAKE M. SHANK,
Plaintiff,

vs.

GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY, a Corporation,
Defendant.

Clerk's Certificate [to Transcript of Record].

I, A. L. Richardson, Clerk of the District Court of the United States, in and for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 60 inclusive, contain true and correct copies of the second amended complaint, answer, judgment, bill of exceptions, petition for writ of error, assignment of errors, order allowing writ of error, bond on writ of error, writ of error, citation, order for transmission of original exhibits, return to writ of error, and clerk's certificate, in the above-entitled cause, which together constitute the transcript of the record and return to the annexed writ of error.

I further certify that the cost of the record herein amounts to the sum of $38.40, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said District Court, affixed at Boise, Idaho, this 30th day of August, 1912.

[Seal] A. L. RICHARDSON,
Clerk. [60]

[Endorsed]: No. 2178. United States Circuit Court of Appeals for the Ninth Circuit. Jake M. Shank, Plaintiff in Error, vs. The Great Shoshone and Twin Falls Water Power Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho.

Filed September 4, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

JAKE M. SHANK, Plaintiff in Error,

vs.

THE GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY, Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of the District of Idaho, Southern Division.

STATEMENT OF THE CASE.

This is an action brought by the plaintiff in error to recover from the defendant damages for injuries which he alleges to have received by reason of the negligence of the defendant in error. The facts as set forth in the complaint are in substance as follows:

That the defendant in error is a corporation and a citizen of the State of Delaware, engaged in the business of

generating electrical power for lighting and other purposes, and is the owner of and in control of a certain high tension power line, carrying a voltage of 22,000 to 23,000 volts, for the purpose of transmitting electricity for lighting and power purposes. That the matter in dispute exceeds the sum of two thousand dollars, exclusive of interest and costs. That the wires of this power line at the place of the accident were not properly insulated and that they were not elevated sufficiently high at that point to permit of the free and unobstructed use of the highway. That while the plaintiff in error was driving along the highway a certain vehicle or machine known as a hay-stacker, the top of said hay-stacker came in contact with the wires of the defendant company and that the electricity escaping from said wires down along said hay-stacker injured the plaintiff in error; that hay-stackers similar to the one in question were in common use and were frequently transported over and along the highways in the vicinity of the accident and prior thereto; that the plaintiff in error was using due care and caution on his part at the time of the accident and that defendant in error was guilty of negligence in not properly insulating its wires and in not suspending them a sufficient height from the highway to permit of the passage thereunder of said hay-stacker. That the plaintiff has been damaged by reason of the injuries which he received in the sum of thirty thousand dollars ($30,000).

The defendant in error filed its answer admitting the incorporation and citizenship of the defendant in error; that the amount in dispute exceeded two thousand dollars exclusive of interest and costs; admitting that it was the owner and did operate and control the poles and wires as

mentioned and set forth in the second amended complaint, and admitting that upon the date of the accident it transmitted over and along its wires a strong and powerful current of electricity, dangerous to the life of any human being who might come near or in contact therewith, and denying the other material allegations of said second amended complaint.

Upon these issues the case was called for trial; and we contend that the plaintiff upon his behalf introduced evidence tending to establish his cause of action, and sufficient at least to be entitled to have a jury pass upon the questions involved. We shall not attempt in this statement of the facts to give more than an outline and a brief statement of the evidence, which we claim is sufficient to establish a prima facie case on the part of the plaintiff.

Elmer Bird, called as a witness on behalf of the plaintiff testified that his business or occupation is that of a civil engineer; that plaintiff's Exhibits "A" and "B" were made by the witness from a survey of the ground at the point of the accident; that he made measurements of the height of these wires from the ground at different points; that at point "A" the wire was practically 29½ feet from the ground according to scale; that at the point "B" it was just about thirty feet and six inches; at point 'X' the wire was 27 feet and 6 inches, not considering the sag; that there is quite an elevation of the ground from point 'A' to point 'X'; it is going down hill pretty rapidly there, practically five feet in drop in about 125 feet of distance. In other words, the point 'X' would be about five feet higher than the point 'A'—the contour of the ground—the elevation at that point (tr. p. 18). Witness continues and testifies: "At the time I was there none of

these wires were insulated. We measured the height of the poles for an interval of either four or five poles west of this point and one pole east. They were varying from 29½ feet to the top of the bottom wire up to thirty-one feet. I found no other place which measured where the wire was so close to the ground as it was at the point marked 'X'—27 feet and 6 inches." (tr. p. 20).

W. H. Harvey, a witness called on behalf of plaintiff, testified: "On or about the 8th day of August, 1910, I was residing immediately across the road from the plaintiff's home. I went up to the point of the accident shortly afterwards, within a minute I should say (tr. p. 23). I noticed the hay-stacker that Mr. Shank was driving at the time of the accident (tr. p. 24). I am familiar with hay-stackers of that kind. At the time I first looked and noticed it the boom on the top of the hay-stacker was horizontal, it was not raised up. At the time I had seen a number of hay-stackers similar to the one Mr. Shank was driving in that vicinity and around in that country; they were very common. I have noticed them being transported up and down the highways of that country and they were at that time. The hay-stacker was being driven west along the road at the time of the accident. In driving west along that road it is necessary to pass under the wires of the defendant company in order to cross the bridge in the road. It is impossible to go along the road without going under those wires (tr. p. 25). I measured the height of the wires at the point of the accident. My measurement was 27 feet 3 inches from the wire to the ground at the point of the accident (tr. p. 26)." On cross-examination he testifies in regard to these stackers: "Nearly everybody that I know had one similar, that is, the outline was similar. I

don't know the length of the booms on them or whether they worked on this hinge. These stackers are not generally kept on the farm (tr. p. 28); they had to depend on each other for help. They would swap derricks and swap machinery, and that necessitated moving back and forth. They practically all had them, either as individuals or as neighbors—community property. I had seen stackers hauled along the road prior to the time Mr. Shank was hurt I would estimate ten or fifteen times (tr. p. 29).

A. F. McCluskey, called as a witness on behalf of plaintiff testified that he is a practicing physician and surgeon and was called upon about the 8th day of August, 1910, to visit Mr. Shank. The witness then testifies as to the extent of the injuries received by Mr. Shank and to the fact that in passing along the road where the accident occurred it was necessary to pass under the wires of the defendant company, and at page 33 of the transcript, he testifies: "I know what a hay-stacker is in a general way; I have noticed a great many of them down in that country. On or about August 8th, 1910, I have seen them up and down the public road. It was not at all uncommon to find them moving,—in fact, a great many men own land on both sides of the same road and move them back and forward to the crops."

H. H. Freedheim, called as a witness on behalf of plaintiff, testified that his business and occupation for a number of years had been electric wiring and construction and contracting and that he is what is known as an electrician, and has been engaged in these various occupations for twenty-two years. He also testified that there is a standard recognized by electricians who are in charge or control of the construction of long distance and other

power lines conducting electricity for power and lighting purposes, as to the height of the poles that should be used in a country similar to this in which the accident occurred. The standard recognized by engineers and parties in charge of the construction of power lines such as this, and in a country such as this is, as to the height of the poles that should be used along these highways, is from thirty-five to fifty feet according to the "authorities I have seen and I know this outside of the authorities, that it is the practice to use poles about forty feet in length for high tension lines. In the construction of these power lines, poles of different lengths, depending on the contour of the country, are used. A country that is traversed sometimes goes up and down small variations and it is the object of using different lengths to keep the top of the wire on a grade, to keep it level as much as possible (tr. pp. 36-37)." On cross-examination he testified: "A forty-foot pole would be practically standard for high tension wire line construction. That means a pole measured from the top to the bottom, forty feet. The pole would ordinarily be put into the ground between six and eight feet, sometimes five feet; that is standard construction for ground that is made of rock or if the earth at that point is rock; if it is ordinarily solid, about five and a half feet or six feet. If I had a forty-foot pole I would put it into the ground about eight feet, probably six, that is, if it was solid (tr. p. 37)." And again, he testified (tr. p. 39): "On a forty-foot pole the first cross-arm might be ten to eighteen inches below the top of the pole. If I was going to have a high tension wire strung to carry a voltage of 22,000 or 23,000 volts and wanted to put the wires a sufficient distance apart, I would put the cross-arm thirty to forty inches below the

wire on a proper insulator on the top of the pole. Out on the end of the cross-arm I would put a pin and an insulator, and for that voltage, the top of the insulator would be in the neighborhood of twelve to fourteen inches above the cross-arm." "I would put a cross-arm down from twenty to forty inches; if I wanted to be safe, I would put it thirty inches." (tr. p. 40).

Charles Coker, called as a witness on behalf of plaintiff, testified that he was familiar with that part of the country shown in plaintiff's Exhibit "A;" that he had charge of the building of the bridge in 1906, which is shown on that exhibit; that the last time he saw the bridge was on March 3, 1912, and at this time it was the same in regard to its location and elevation as it was at the time it was built; that at the time he constructed this bridge, the defendant company did not have its electric wires or poles along that road; that he had seen hay stackers around that country prior to August 8th, 1910, that there were quite a few of them in that vicinity (tr. p. 41).

F. E. Chamberlain, a witness called on behalf of plaintiff testified that "in driving west along the road to cross over the bridge it was necessary to pass under the wires of the defendant company in driving by them on and off that bridge. I know what is known as a hay stacker. I have seen a good many of them. I have seen them around the vicinity of the bridge and various places on the tracks since 1906. I have seen them on the highways at that time and both prior and since" (tr. p. 43).

Jake M. Shank, the plaintiff, testified as a witness that he lived in the neighborhood of about two hundred yards west of the bridge near where the accident occurred; that on the morning of the accident he left his house and went

down after the stacker. His hired man went with him. And the witness testifies (tr. p. 44): "We had four horses hitched on to it. After we hitched on to it we went south under the power line and up the road west. Before I came to the point where the accident occurred I had passed under the wires of the defendant company; the line of wires shown on Exhibit "A." about, probably, three hundred yards west, I passed under the line. I passed straight along underneath them and then turned on the road. From the point of the accident it was probably three or four hundred yards down the road where I had crossed under the wires. I had no difficulty in going under the wires at that place. At the time of the accident I was standing outside of the derrick, on the south side of the derrick, away from the wires. We pulled up to the bridge up the road and stood in the road and I was driving the inside team next to the wire fence and was right up against the wire. The hired man had to pull his team about four or five inches to square the derrick and he had to pull right in towards my team and I got out from the fence away from the horses and stood on the south side of the derrick and I stopped outside of the derrick and asked him if he was already and he said 'Yes," and just as I said that I threw my arm up and grabbed the manila rope there, and just as I grabbed it there was a flash and blinded me and the wire swung and hit me on the arm, the wire cable. I was conscious after that but could not see or holler, could not do anything at all. I was hanging on that wire and was drawn up in a knot you might say. I could feel the electricity going out all over me and I could hear the popping of the electricity" (tr. p. 45). And again, "This same derrick passed under those wires at a

point east of the accident. I did not pass under them myself but I was there when Mr. Van Hoy and his hired man took the same derrick out east of this same pole; that was on the 22nd day of July, 1910. This same derrick had passed under those wires to my knowledge three times besides those times which I have testified to. We pulled it out under the wires twice when I was present, west of my place on my place about, I should say, four hundred yards west of where the accident happened, and Mr. Van Hoy I have seen pull it out once or twice through there at different points on the line. On the morning when I brought the derrick out the boom was in a horizontal position—it was fastened in that position—it was tied by the other end" (tr. p. 46). And again, "The highest point of the pole of that derrick is about 27 feet 5 or 6 inches, I should say; we measured it." And again, "I had passed under the wires and had noticed this derrick pass under it the times I have mentioned and the pole cleared the wires in each case. Mr. Van Hoy built the stacker first and I helped him remodel it in 1910, prior to the accident. We had been told that the wires were thirty feet above and we had to build some kind of a derrick so that we could get the derrick under the wires without having them taken off and consequently we built the derrick between 27 and 28 feet so that we would not have any interference, no trouble with it at all. I have lived on my place since about the 15th of April, 1906. Prior to August 8th, 1910, the time of my accident, I had seen hay stackers similar to mine in that vicinity; I had seen them transported up and down the highways in that vicinity (tr. p. 47)."

The foregoing statement of facts is only a brief synopsis of the kind and character of evidence which was introduced on behalf of the plaintiff. The record shows that in the testimony of the witnesses there were some inconsistencies, or perhaps, contradictions, but even if this were so, the weight to be given to the evidence and the reconcilements to the contradictions or any inconsistencies were questions that were exclusively within the province of the jury to decide.

Assignment of Errors.

1.

The Court erred in granting the defendant's motion for a non-suit herein, for the reason that the law does not permit a United States court to grant an involuntary non-suit against the plaintiff.

2.

The Court erred in holding that the plaintiff had failed to show that the defendant company was guilty of any negligence, causing the injuries received by the plaintiff.

3.

The Court erred in holding as a matter of law that the evidence introduced on behalf of the plaintiff showed that he was chargeable with contributory negligence sufficient to preclude his recovery in this action.

The Court erred in entering its judgment granting the motion of the defendant for a non-suit and dismissing the plaintiff's action herein.

ARGUMENT.

First, we contend that the District Court was not authorized to grant a peremptory non-suit against the plaintiff at the close of the plaintiff's case, and in support of this contention, we call the Court's attention to the case of Northern Pacific Railway Co. v. Charless, 51 Fed. 562, in which this Court, in an opinion delivered by Mr. Justice Morrow, at page 571, announces the rule as follows:

> "When the plaintiff had closed his testimony and rested his case, counsel for defendant moved the Court for an order dismissing the case, and for the non-suit of the plaintiff. The motion was denied, and the action of the Court in denying the motion is claimed as error. The refusal of the Court to grant this motion was in accordance with the established practice. It has been repeatedly decided by the Supreme Court that courts of the United States have no power to order a peremptory non-suit against the will of the plaintiff. Elmore v. Grymes, 1 Pet. 469; De Wolf v. Rabaud, Id. 476-496; Crane v. Morris' Lessee, 6 Pet. 598-610; Silsby v. Foote, 14 How. 218-222; Castle v. Bullard, 23 How. 172-183. It is also assigned as error that the Court should not have required defendant to proceed to its defense after plaintiff had rested his case, but should have directed the jury to return a verdict in favor of the defendant. That motion, however, does not appear, by the bill of exceptions, to have been made by counsel for defendant; besides, he proceeded with the defense, and introduced testimony in that behalf. This action on his part effectually disposed of all question of error. The refusal of the Court to instruct the jury at the close of plaintiff's evidence that he was not entitled to recover could not be assigned as error, even if the proper motion had been made, because the defendant, at the time of requesting such instruction, had not rested its case, but afterwards went on, and introduced evidence in its own behalf. Railway Co. v. Cummings, 106 U. S. 700, 701, 1 Sup. Ct. Rep. 493; Insurance Co. v. Crandal, 120 U. S. 527-530, 7 Sup. Ct. Rep.

685; Robertson v. Perkins, 129 U. S. 233-236, 9 Sup. Ct. Rep. 279."

We desire to call the Court's attention to the rule which should govern the trial judge when called upon to grant a non-suit or direct a verdict for the defendant at the close of the plaintiff's evidence, and shall confine ourselves to the rule as announced by the federal courts. In the case of Rochford v. Pennsylvania Co., 174 Fed. 81, a case decided by the Court of Appeals of the Sixth Circuit, that Court, by Mr. Justice Lurton, announced the rule as follows:

> "In support of the action of the Court in directing a verdict, two points have been urged: First, that Rochford's evidence as to what he was doing when struck by the engine is in conflict with the allegations of his petition and other conceded or demonstrable facts of the situation; and, second, is self-contradictory upon vital points. We may lay upon one side any question of the credibility of Rochford as a witness, either because he contradicts himself, or because he is contradicted by other witnesses as to the facts material to a verdict in his favor.
>
> "A motion for an instructed verdict, upon an insufficiency in law of the evidence, presupposes that the witnesses testifying to the facts adduced to make a case for the party against whom the motion is made are worthy of credit. It is as if the party making the motion had demurred to the evidence and is equivalent to saying: 'We concede the truth of the facts which are relied upon to make a case for the plaintiff, or a defense for the defendant; but they are insufficient in law to support a verdict which must be founded upon such facts.' The credibility of a witness is peculiarly a question for the jury, under proper instructions by the Court. 1 Greenleaf on Evidence (14th Ed.) Par. 10; 6 Cyc. p. 694. Neither is the mere fact that there is a preponderance of the evidence in favor of the party moving for an instructed verdict enough to require the judge to take a case

from the jury, even though it might justify a new trial. City, etc., Ry. v. Svedborg, 194 U. S. 201, 24 Sup. Ct. 656, 48 L. Ed. 935; Mt. Adams, etc., Ry. v. Lowery, 74 Fed. 463, 20 C. C. A. 596. If the plaintiff has produced material evidence, sufficient, if believed and uncontradicted, to warrant a verdict, no amount of contradictory evidence will authorize a trial judge to take the question of its effect and weight away from the jury. Railroad Co. v. Slattery, 3 App. Cases 1155; Insurance Company v. Doster, 106 U. S. 30, 32, 1 Sup. Ct. 18, 27 L. Ed. 65; Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780."

In the case of Janoski v. Northwestern Improvement Co., 176 Fed. 215, this Court, by Mr. Justice Ross, announces the rule as follows:

"As a matter of course the Court cannot, in such cases, undertake to weigh conflicting evidence, and the law is well settled that in passing upon a motion to take a case from the jury, it is the duty of the Court to take 'that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus.' Mt. Adams & E. P. Inclined Railway Company v. Lowery, 74 Fed. 463, 20 C. C. A. 596; Jenkins & Reynolds Company v. Alpena Portland Cement Company, 147 Fed. 641, 77 C. C. A. 625, and numerous cases there cited."

"The question of negligence is one of law for the Court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. Grand Trunk R. Co. v. Ives, 144 U. S. 408, 417, 36 L. Ed. 485; Texas, etc., R. Co. v. Cox, 145 U. S. 593, 606, 36 L. Ed. 829; Gardner v.

Michigan Cent. R. Co., 150 U. S. 349, 361, 37 L. Ed. 1107."

"Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. If fair-minded men, from the facts admitted, or conflicting testimony, may honestly draw different conclusions as to the negligence charged, the question is not one of law but of fact, and to be settled by the jury under proper instructions. Richmond, etc., R. Co. v. Powers, 149 U. S. 43, 37 L. Ed. 642; Northern Pac. R. Co. v. Everett, 152 U. S. 107, 38 L. Ed. 373; McDermott v. Severe, 202 U. S. 600, 604, 50 L. Ed. 1162."

Sandige v. Atchison S & S. F. Ry 193 Fed. 867

In the case of Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, 74 Fed. 463, a decision of the Circuit Court of Appeals of the Sixth Circuit, the Court say:

"Neither is it a proper standard to settle for a peremptory instruction that the Court, after weighing the evidence in the case, would, upon a motion for a new trial, set aside the verdict. The Court may, and often should, set aside a verdict, when clearly against the weight of evidence, where it would not be justified in directing a verdict. Neither do we understand this view to be in conflict with anything decided by the Supreme Court. When that Court said in Insurance Co. v. Doster, cited heretofore, that a case should not be withdrawn from the jury 'unless the testimony be of such a conclusive character as to compel the Court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it,' it did not mean to define the limits within which a trial judge might and ought to grant a new trial because against evidence, or against the weight of evidence. Many cases occur, in the history of nisi prius trials where a new trial ought to be granted because the verdict is clearly against the weight of evidence, when it would have been erroneous to have directed a verdict in the first instance."

Keeping in view the rule of law as above announced by which a trial judge should be governed in passing upon an application for a directed verdict, we will call the Court's attention briefly to some of the facts in evidence which we contend were sufficient to justify the jury in finding the defendant guilty of the negligence charged in the complaint. The witness Freedhein, an electrical engineer, who testified to large experience in the construction of high power transmission lines, stated: "In the construction of these power lines, poles of different lengths, depending on the contour of the country, are used. A country that is traversed sometimes goes up and down small variations and it is the object of using different lengths to keep the top of the wire on grade, to keep it level as much as possible." Now, in the case at bar, if this method had been followed by the defendant company, the height of its wires at the point of the accident would have been the same as at the other points along the line and of sufficient height to have permitted this stacker to pass under the same without any danger of contact with the wires. Again, the witness testified that "the standard recognized by engineers in the construction of power lines such as this and in a country such as this, as to the height of the poles that should be used along these highways, is from thirty-five to fifty feet." And again, he testified on cross-examination that a forty-foot pole would be practically standard for high tension wire construction; that the pole would ordinarily be put in the ground between six and eight feet, sometimes five feet. And again, he testified in regard to the proper construction of this power line that he would put a cross-arm down from twenty to forty inches; if he wanted to be safe, he would put it

thirty inches, and on the end of the cross-arm he would put a pin and an insulator and, for the voltage carried by this company, the top of the insulator would be in the neighborhood of twelve to fourteen inches above the cross-arm.

Now, taking this statement of the witness, if the defendant company used a forty-foot pole and the same was put in the ground to a depth of six feet, that would leave thirty-four feet of the pole above the ground, putting the cross-arm down thirty inches from the top of the pole and then on the end of this cross-arm, placing a pin twelve inches high with the insulator on it, to which the lower wire is attached, the lower wire would then be thirty-two feet and six inches above the ground. This is an elevation of one foot greater than the elevation of the wires of the defendant company at any point which was measured and testified to upon the trial and amply sufficient to permit this hay-stacker to pass under the same without any contact therewith.

Now, it is true that this witness, like many another witness who was not used to court proceedings, may have made statements somewhat at variance with those just quoted above, but that was a matter for the jury to reconcile and not the Court, as was said by the Court in the case of Rochford v. Pennsylvania Co., *supra*.

> "We may lay upon one side any question of the credibility of Rochford as a witness, either because he contradicts himself or because he is contradicted by other witnesses as to the facts material to a verdict in his favor."

And again, the Court say:

> "The credibility of a witness is peculiarly a ques-

> tion for the jury under proper instructions by the Court."

And again,

> "If the plaintiff has produced material evidence sufficient, if believed and not contradicted, to warrant a verdict, no amount of contradictory evidence will authorize a trial judge to take the question of its effect and weight away from the jury."

The evidence in the case discloses the fact that this stacker was constructed by the plaintiff with the knowledge upon his part that the same would pass under the wires of the defendant company and that it did pass under these wires at other points along the line and if the wires of the company had been kept upon grade as the witness Freedhein stated they should be, this accident would probably not have occurred. The evidence in the case establishes the fact that these hay stackers were in common use in that country at the time of and prior to the accident and we contend, therefore, it was the duty of the defendant company to anticipate that these hay stackers, while being transported along the highways, might come in contact with its wires and persons be injured thereby. Their use of the highway was not exclusive and we know of no reason or any law why farmers in a community should not be permitted to transport their hay stackers along the public highways without being in constant danger from contact with the wires of this company. The evidence discloses the fact that on account of the contour of the ground, that at the point of the accident, the road was elevated some four or five feet, and we contend that in the construction of this power line the company should have noticed that at the point where their wires were sus-

pended over the highway that such elevation existed and provide accordingly for the elevation of those wires at that point.

Again, the witness, Elmer Bird, an electrician, testified that these wires were not insulated. This fact alone has been held by the courts to establish *prima facie* a case of negligence. In the case of Colusa Parrot Mining & Smelting Co. vs. Monahan, 162 Fed. 276, this Court, by Judge Ross, say:

> "There could have been no better evidence of the improper insulation of the wire in question than the shock the plaintiff received from touching it: At points or places where people have the right to go for work, business, or pleasure the insulation and protection should be made as nearly perfect as reasonably possible, and the utmost care used to keep them so. Authorities, *supra*. See also, Haynes vs. Raleigh Gas Co. 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; Atlanta Con. St. R. Co. vs. Owings, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798; Thompson's Commentaries on the Law of Negligence, par. 800."

In Gregory vs.Adams, 14 Gray, 242, it was held to be question for the jury as to whether or not an elephant was a proper animal to drive over a highway.

In Commonwealth vs. Allen, 148 Pa. 358, it is held that the question whether a particular use of a public highway is unreasonable use is a question of fact for the jury. Citing Allegheny vs. Zimmerman, 95 Pa. 287.

> "An electric light company which maintains its wires in a public highway is bound to adopt the best precautions against danger, in general use, which experience has shown to be effectual, and to avail themselves to every such known safeguard, or generally approved invention, so as to lessen the danger to persons lawfully using the highway."

Eagle Hose Co. vs. Elec. Light Co. 33 Pa. Supr. Ct. 581.

See same point Colo. Elec. Co. vs. Soper, 88 Pac. 161 (Colo.).

"A company maintaining wires for the purpose of supplying light and power must exercise the utmost care at places where persons may reasonably be anticipated to go for work, pleasure or business, to prevent injury, and that at such places a company is bound perfectly to insulate and protect its wires from contact, and to maintain them in that condition."

Rowe vs. Taylorville Elec. Co. 114 Ill. App. 535.

Judgment affirmed, 72 N. E. 711 (Ill.).

We think it unnecessary to burden this record or take the time of the Court with the citation of the many and various cases in which accidents have occurred from persons coming in contact with electric wires, but will cite the Court to a few cases wherein the question of negligence and contributory negligence under a state of facts somewhat similar to the facts in this case were submitted to the jury and a verdict for the plaintiff sustained. In the case of Winegarner vs. Edison Light & Power Co. 109 Pac. 778, the facts were that the plaintiff was engaged in moving a house along the street of a city and the comb or roof of the building was higher than the wires and the plaintiff went upon the roof of the house and took hold of the wire in order to raise it up sufficiently high for the house to pass under. He was immediately killed by the shock, the wires being charged with a voltage of 23,000; and the Supreme Court of Kansas in the opinion say:

"There is evidence that the company had notice of the moving of this building. Whether it had notice

> of its passing the particular point where the accident occurred or not, is not shown, but there is evidence tending to show that the moving of buildings was of so frequent occurrence that the defendant must have taken notice of such use of the streets. . . . . If, from all the circumstances, the defendant had reason to apprehend that the building would be moved under the wires where the accident occurred, it was its duty, knowing its wires to be highly charged with electricity, to have such wires at the street crossing insulated, or to take such other precautions as might be necessary, to protect any one who might be liable to be upon such building from contact or injury from such wires. The case was submitted to the jury under proper instructions, and we think that the jury were amply justified by the evidence in finding that the defendant was guilty of negligence, which caused the death of the deceased, and that the deceased was not guilty of contributory negligence."

In the case of Nelson vs. Branford Lighting & Water Co. 54 Atl. 303, the Court say:

> "In determining what precautions against danger to human life were reasonably necessary, it was bound to consider all the uses to which the bridge was customarily put. It is found that it was convenient to the defendant to have the wires no higher above the truss; but convenience in such a matter is a subordinate consideration. The bridge, as part of a public highway, was open to general public use. Under the law of this State the purposes of a highway are not regarded as wholly restricted to serving the right of passage. He who is standing on one as a mere sightseer, to gratify his curiosity, is rightfully there. Bunnel vs. Berlin Iron Bridge Co. 66 Conn. 24, 36, 33 Atl. 533."

So in this case we contend that the defendant company was bound to consider that the public highway might be used for the purpose of transporting these hay stackers

back and forth, and that the same would be moved under their wires at the point of the accident and elsewhere.

In the case of Birsch vs. Citizens' Electric Co. 93 Pac. 940, the plaintiff was a hod carrier and, while working upon a building, came in contact with the electric wires of the defendant company at a distance of twenty to twenty-two feet above the ground, the wires and poles of the electric company being three or four feet from the wall upon which the plaintiff was working. He recovered a judgment and the judgment was affirmed.

> "Where a boy climbs a chestnut tree standing on a sidewalk and is injured by coming in contact with a defectively insulated electric wire, he can recover against the electric light company, where the tree was on the premises not belonging to the company, the defective insulation had continued from four to six months, and children were accustomed to play around the tree and to climb in it."
>
> Mullen v. Wilkesbarre Gas & Elec. Co., 77 Atl. 1108 (Pa.)

The case of Clough v. Rockingham County Light & Power Co., 71 Atl. 223, is another case in which a house was being moved along a street of the city and one of the wires of the defendant company in that case caught on the top of the building and the plaintiff attempted to remove the wire therefrom and was injured; and the Court held that the trial court properly refused to enter a nonsuit in the case.

In Mullen v. Wilkesbarre Gas & Elec. Co., 77 Atl. 1108, in the opinion the Court say:

> "In Fitzgerald v. Edison Electric Co., 200 Pa. 540, Mr. Justice Mitchell, defining the obligation of those who introduce into a community that dangerous

agent known as electricity, said: 'The company, however, who uses such a dangerous agent (a wire charged with an electric current) is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires and liable to come accidentally or otherwise in contact with them.' In this carefully chosen language quoted and adopted in Doltry v. Media Electric Light Co., 208 Pa. 403, our highest judicial tribunal has plainly defined the measure of defendant's obligation and described the class to every member of which the law extends the protection that would be secured by the faithful discharge of that obligation. Why was not the plaintiff in that class? Upon what theory can the defendant successfully contend that he was not lawfully in proximity to its wires?"

For the reasons above stated, counsel for the plaintiff in error pray this Honorable Court that the judgment of the trial court may be reversed and the cause remanded for trial, and that the plaintiff in error recover his costs herein.

Respectfully submitted,

ALFRED A. FRASER and

W. P. GUTHRIE,

Attorneys for Plaintiff in Error.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

JAKE M. SHANK, Plaintiff in Error,

vs.

THE GREAT SHOSHONE & TWIN FALLS WATER POWER COMPANY, a Corporation, Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the District of Idaho, Southern Division.

Statement of Facts.

This is an action for damages arising out of personal injuries received by plaintiff in error from coming in contact with an electric wire of defendant in error while dragging a hay stacker along a country road, or highway, in Twin Falls County, Idaho, on the 8th day of August, 1910.

On said day, defendant in error was conducting and for a long time prior thereto had conducted over said wire a

powerful current of electricity of the voltage of about 23,000 volts, for the purpose of furnishing light and power to a large number of persons and for other purposes.

The point along said road at which the injuries complained of by plaintiff were received was not within the limits of any city, town or village, incorporated or unincorporated.

Said road traversed a new irrigation project known as the Twin Falls Carey Act Project and water had been turned onto the lands in the vicinity of the place where the accident occurred, in 1906, before which time said land had been covered with sagebrush (Tr. pp. 30 and 42).

The electric line of defendant in error was constructed in 1908, and was constructed in accordance with the standard fixed by electrical engineers, as shown by the testimony of plaintiff's witness, Freedhein. The wires were not insulated.

At the time defendant's electric line was built plaintiff was residing on his ranch near the scene of the accident and continued to reside there up to the time he was injured. The electric light poles were practically against his fence and he was compelled to go under the wires to get into his place. He saw the wires frequently, knew that they were charged with electricity and that it was dangerous to come in contact with them (Tr. p. 48).

On the 8th day of August, 1910, plaintiff and Moran, his hired man, hitched four horses abreast onto the hay stacker and dragged the same up the road to the bridge where the accident occurred. The mast on the stacker was about twenty-seven (27) feet six (6) inches high, and it carried a boom about thirty-eight (38) or forty (40) feet long, twelve (12) or thirteen (13) feet of which was

on one side of the mast and the remainder on the other (Tr. p. 50). The boom is fixed to the mast at a height of about twenty-two (22) feet (Tr. p. 49). The long end of the boom works on a hinge whereby the pole is moved up and down to accommodate itself to the varying height of the hay stacks (Tr. p. 50). Just before reaching the bridge the road makes a turn and the long end of the boom swung out under the electric light wires (Tr. p. 54), and when plaintiff reached the bridge he left the team he was driving and which would have to be quieted, and which was on the north side of the stacker, and, after dropping the lines, went to the south side of the stacker (Tr. p. 57). He asked Moran if he was ready to pull his end of the stacker square with the bridge, and being answered in the affirmative he took hold of a manila rope (Tr. p. 52) which was hanging from the butt end of the boom (Tr. p. 55), when a flash came, the wire cable on the derrick struck him and he was "drawn up in a knot" (Tr. p. 45). Moran released him from the cable; the horses ran away; the derrick knocked both men down and they were dragged under it to the north side of the bridge (Tr. p. 46). Plaintiff was injured as testified to by his witnesses Dr. McCluskey and Harvey.

The accident was caused by the long end of the boom coming in contact with defendant's electric wire (Tr. pp. 27 and 30). The nearest point under the electric wire from the bridge is five (5) or six (6) feet (Tr. p. 30). Plaintiff was not watching the boom as he went along the fence and up to the bridge, and testified, "I was watching my team and couldn't very well watch the team and the boom too" (Tr. p. 54).

No other person was injured by coming in contact with defendant's wires along that road either before or after plaintiff was hurt (Tr. pp. 34 and 44).

There were no other stackers in that section of the size of the one that plaintiff in error was transporting at the time he was injured (Tr. pp. 27 and 28; 41 and 42).

Harvey said but three men whom he could name dragged hay stackers along the road, and they were plaintiff, Van Hoy and Matthews, and the stacker they were dragging was the one plaintiff had at the time he was injured (Tr. p. 29).

The wagon road was established when plaintiff located on his ranch in 1906 and was supposed to be 50 feet wide from fence to fence. The north side of the road where a team is made to go onto the bridge was against plaintiff's fence (tr. p. 48).

At the close of plaintiff's case the Court granted defendant's motion for non-suit.

Argument.

The assignments of error are three in number, the first of which is based upon the erroneous assumption that the law does not authorize or permit Federal courts to grant an involuntary non-suit against a plaintiff.

This being an action for damages for personal injuries is an action at law, in which, in questions of "practice, pleadings and forms and methods of proceeding," United States courts are required to conform "as near as may be" to those of the courts of the State in which the trial is had.

Rev. Stats. Sec. 914.

Sec. 4354, Revised Codes of Idaho (1908), reads as follows:

> "An action may be dismissed, or a judgment of non-suit entered, in the following cases: * * * 5. By the court, upon motion of defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury."

The rules of practice of the United States Circuit Court for the Ninth Circuit, District of Idaho, provide, Rule 60:

> "The defendant in an action at law, tried either with or without a jury, may either at the close of the plaintiff's case or at the close of the case on both sides, move for a non-suit. The proceedure on such motion shall be as follows: The defendant, or his counsel, shall state orally in open court that he moves for a non-suit on certain grounds, which shall be stated specifically. Such a motion shall be deemed and treated as assuming for the purposes of the motion (but for such purposes only) the truth of whatever the evidence tends to prove, to wit, whatever a jury might properly infer from it. If, upon the facts so assumed to be true as aforesaid, the Court shall be of the opinion that the plaintiff has no case, the motion shall be granted and the action dismissed."

In Coughran vs. Bigelow, 164 U. S. 301, the Court, speaking through Mr. Justice Shiras, said:

> "The ruling of the Supreme Court of the territory of Utah in affirming the action of the trial court ordering a non-suit of plaintiffs is assigned as error. It was held by this Court in Elmore v. Grymes, 26 U. S. 1 Pet. 469, that a circuit court of the Untied States had no authority to order a peremptory non-suit against the will of the plaintiff. This case has been followed in repeated decisions. Crane v. Morris, 31 U. S. 6 Pet. 598; Castle vs. Bullard, 64 U.

"The foundation for those rulings was not in the constitutional right of a trial by jury, for it has long been the doctrine of this Court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the onus of proof is imposed, and that, if the evidence be not sufficient to warrant a recovery, it is the duty of the Court to instruct the jury accordingly, and, if the jury disregard such instruction, to set aside the verdict. Parks vs. Ross, 52 U. S. 11 How. 362; Schuchardt vs. Allen, 68 U. S. 1 Wall. 359; Pleasants vs. Fant, 89 U. S. 22 Wall. 120. And, in the case of Oscanyon v. Winchester Repeating Arms Co. 103 U. S. 264, it was said by Mr. Justice Field, in delivering the opinion of the Court, that the difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is 'rather a matter of form than of substance.'

"That the cases above cited, which held that the circuit court of the United States had no authority to order peremptory non-suits, were based, not upon a constitutional right of a plaintiff to have the verdict of a jury, even if his evidence was insufficient to sustain his case, but upon the absence of authority, whether statutory or by a rule promulgated by this Court, is shown by the recent case of Central Transp. Co. vs. Pullman's Palace Car Co. 139 U. S. 24, where it was held that, since the act of Congress of June 1, 1872 (17 Stat. at L. 197), re-enacted in Sec. 914 of the Revised Statutes, courts of the United States are required to conform as near as may be in questions of 'practice, pleadings, and forms and modes of proceeding,' to those existing in the courts of the state within which the trial is had, and a judgment of the circuit court of the United States for the eastern district of Pennsylvania, ordering a peremptory nonsuit, in pursuance of a state statute, was upheld. It is the clear implication of this case that granting a nonsuit for want of sufficient evidence is not an infringe-

ment of the constitutional right of trial by jury.

"As there was a statute of the territory of Utah authorizing courts to enter judgments of peremptory non-suit, there was no error in the trial court in granting the motion for non-suit in the present case, nor in the judgment of the Supreme Court affirming such ruling; if, indeed, upon the entire evidence adduced by the plaintiffs enough did not appear to sustain a verdict."

See, also, Peoples Bank vs. Aetna Ins. Co. (C. C. A. 4 Cir.), 74 Fed. 512.

Second Assignment of Error.

This relates to the holding of the Court that plaintiff had failed to show that the injuries received by him were the result of the negligence of defendant in error.

Sec. 2837, Rev. Codes of Idaho, enacted Laws of 1903, p. 343, reads as follows:

"Any person, company, or corporation, incorporated or that may hereafter be incorporated under the laws of this State or of any State or Territory of the United States, and doing business in this State, for the purpose of supplying, transmitting, delivering, or furnishing electric power or electric energy by wires, cables, or any other method or means, shall have and is hereby given the right to erect, construct, maintain, and operate all necessary lines upon, along and over any and all public roads, streets and highways, except within the limits of incorporated cities and towns and across the right of way of any railroad or railroad corporation, together with poles, piers, arms, cross-arms, wires, supports, structures and fixtures, for the purposes aforesaid, or either of them, in such manner and at such places as not to incommode the public use of the road, highway, street, or railroad, or to interrupt the navigation of water, together with the right to erect, construct, maintain and operate upon said electric power line a telephone line to be

> used only in connection with the said electric energy and power line: *Provided*, That the corporation, company or person exercising the right of way herein and hereby granted, shall first apply to the board of county commissioners for permission to construct in the manner provided by law, and to acquire a right of way, and shall give to the county into or through which the right of way herein and hereby granted is exercised, a bond, with surety to be approved by the board of county commissioners, in the sum of five thousand dollars, conditioned to hold the said county harmless from any and all liability on account of the erection, construction, maintenance, or operation of the said electric line or lines: *Provided, further*, That nothing in this section shall be construed to mean the right to occupy public roads for any railroad or car line of any kind."

That defendant was duly authorized, in accordance with said statute to, and had a legal right to, construct its electric line where it did construct it along said road, is not questioned, and complaint is made solely upon the grounds that at the point upon said road at which the accident occurred, defendant's wires were suspended at a height of but twenty-seven (27) feet and so close to the center or traveled portion of the road as to render the road dangerous to persons traveling along it, and that said wires were not protected by safe and sufficient insulating material (tr. p. 3).

Section 928, Rev. Codes of Idaho (formerly Section 932, Rev. Statutes, and in force since 1887), reads as follows:

> "All highways, except alleys and bridges, must be at least fifty feet wide except those now existing of a less width."

Plaintiff testified that he took up his residence on his ranch near the scene of the accident, in April, 1906, (tr.

p. 47); that "the defendant company's line of poles is just outside my fence, practically against my fence; at the time I went on my land, I don't know whether this road was accepted by the county but the road was established when I went there. This road is supposed to be 50 feet from fence to fence. The north side of the road at a point where you made a turn to go onto the bridge goes right up against my fence. The main traveled part of the road is graded right to the fence" (tr. p. 48).

It is apparent from the foregoing that the electric line was built along the north side of the road and twenty-five feet from what the law required, and plaintiff stated, should be the center of it, and that the poles were erected as far from the road as they could be without being placed within plaintiff's enclosure.

The poles of defendant in error, on which the electric wires were strung, were about 200 feet apart (tr. p. 20.) By actual measurement, the height of the bottom wire on five of said poles, above the ground varied from twenty-nine and one-half ($29\frac{1}{2}$) to thirty-one (31) feet (tr. p. 20; recross-ex. p. 21). At the point of contact, marked "X" on plaintiff's exhibit "B", and between the poles marked B and B, the bottom wire was twenty-seven and one-half ($27\frac{1}{2}$) feet above the ground, not considering the slack, which would make the lowest point on the wire about

twenty-seven feet three inches from the ground at a guess (tr. pp. 20 and 26).

We apprehend that this Court will take judicial cognizance of the fact that wire contracts with the cold and expands with the heat, hence there is always a sag in

wires between poles, as, if they were stretched taut, they would break in cold weather.

The electric wires of defendant were not insulated.

H. H. Freedhein, an electrical engineer, was called by plaintiff as an expert witness. He testified, on direct examination, that "the standard recognized by engineers and parties in charge of construction of power lines such as this is and in a country such as this is, as to the height of the poles that should be used along these highways, is *from* thirty-five (35) to fifty (50) feet, according to authorities I have seen, and this I know outside of the authorities. *It is the practice to use poles about forty feet in length for high tension transmission lines.* In the construction of these power lines poles of different lengths are used, depending on the contour of the country. A country that is traversed *sometimes* goes up and down, small variations, and it is the object of using different lengths to keep the top of the wire on a grade, to keep it level as much as possible" (tr. p. 36).

He did not state that some of the poles on this line should have been thirty-five (35) feet, some forty (40) feet and some fifty (50) feet, but, on the contrary, he testified on cross-examination, that "if a pole is seven (7) inches in diameter at the top and forty (40) feet long, it is a suitable pole for all voltages across a country such as the one here in question. It is practically a level country. All the variations in the surface are small undulations that come in a comparatively level country" (tr. p. 37).

He stated, on direct examination, that it is the practice to use poles about forty feet in length for high tension transmission lines (tr. p. 36), and on cross-examination, that a forty-foot pole would be practically standard for

high tension wire construction; that such a pole should be put in the ground between six and eight feet, probably six feet if the earth was solid, and, after testifying to the topography of the country traversed by defendant's line, that he considered a forty foot pole standard and that he would put it about eight feet in the ground (tr. pp. 37 and 38).

On direct examination, Freedhein did not testify to the manner in which the wires and insulators were placed on the poles of defendant in error, but, on cross-examination, he stated that there were "three wires strung on these poles, one on top and two at the sides of the arms, and these are on the cross-arm. *It is the general, usual and standard form of construction so far as the wires are concerned.* It is a three phase current. They usually put one wire on top with an insulator on top of the pole, then the cross-arm lower down and an insulator on the top of the cross-arm and the wires are attached to the insulators. The wires were attached to the insulators, the usual insulators in the ordinary way upon these poles. I don't believe that these are the usual insulators that are accustomed to be used on good construction. *I did not go up to look at them.* If what I have heard of the voltage being 22,000, I certainly would object to them. I don't know about the voltage on this particular line. Wires range from forty-two to seventy-two inches apart in my experience if for high voltage. The lower wires on high voltage of from 22,000 to 23,000 would be put about eighty inches to forty, or sixty, or seventy-two inches apart, and in good construction, the wire on the top is about the distance from these other wires as they are apart. *I did not go up to measure or see how these wires were located in that regard.* * * *

On a forty-foot pole the first cross-arm *might* be ten to eighteen inches below the top of the pole. If I was going to have a high-tension wire strung to carry a voltage of 22,000 or 23,000 volts and wanted to put the wires a safe distance apart, I would put the cross-arm thirty to forty inches below the wire on a proper insulator on the top of the pole. Out on the end of the cross-arm, I would put a pin and an insulator and for that voltage the top of the insulator would be in the neighborhood of twelve to fourteen inches above the cross-arm. Opinions might differ on this subject. I think for a voltage of 22,000 or 23,000 volts a cross-arm six to eight feet would be long enough and fairly standard and the top wire ought to be the same distance away from the other two that they are from each other. I think that would be enough for 22,000 volts, but I don't know about having examined the books to see whether any electrical authority ever concluded that that was sufficient. The hypothenuse formed by the wire from the top to the further end of that arm would be great enough separation. I would put the cross-arm down from twenty to forty inches. If I wanted to be safe, I would put it thirty inches" (tr. pp. 38, 39 and 40).

If the testimony of Freedhein proves or even tends to prove anything, it is that defendant's electric line was constructed in accordance with the standards fixed by electrical engineers. He stated that a forty foot pole is standard and should be placed in the ground eight feet where the earth is not rock solid. As the point at which this accident occurred is in a practically level country, according to Freedhein, and but a few feet from the farm of plaintiff, the presumption would be that the earth would not be rock but soil, hence the pole should be eight feet in

the ground. According to the testimony of plaintiff's witness, Elmer Bird, the average height of the lowest wire on five poles was about 30 feet, hence it would appear that the length of the pole from the end in the ground to the lowest wire would be about thirty-eight (38) feet. Freedhein stated that, in standard construction, there should be the same distance between the wire on top of the pole and the wires on the cross-arm, as there is between the wires on either end of the cross-arm. He fixed that distance for high voltage, at from 42 to 72 inches, at from 40 to 60, to 72 or 80 inches, (tr. p. 38), at 6 to 8 feet as "fairly standard," at 20 to 40 inches, and "if I wanted to be safe, I would put it 30 inches" (tr. pp. 38 and 40). If the lowest wire on the pole was about 38 feet from the end of the pole, and the upper wire should be 42 inches higher, the pole would be about 41 feet long; if the highest wire was 72 inches above the lowest, the pole would be about 43 feet long; if the distance between the highest and lowest wire was eight (8) feet, the pole would be about 45 feet long; and if the distance was thirty (30) inches, the length of the pole would be about 40 feet. The Court will bear in mind the fact that Freedhein did not know how far the wires were apart on defendant's poles (tr. p. 38).

Electrical Companies Not Insurers.

In Shawnee Light & Power Co. v. Sears (Okl.), 95 Pac. at p. 453, it is said:

> "That defendant is not an insurer, and that instructions, No. 1 offered by it, correctly states the law, is the holding of practically all the authorities upon this point. 20 Cyc. p. 471; New Omaha Light Co. vs. Anderson, 73 Neb. 84, 102 N. W. 89; Knowlton vs. Des Moines Edison Light Co. 117 Iowa, 451, 90 N. W. 818;

Norfolk Ry. & Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502; Citizens Ry. Co. v. Gifford, 19 Tex. Civ. App. 631, 47 S. W. 1041; City of Denver v. Sherret, 88 Fed. 226, 31 C. C. A. 499."

See also Denver Consol. Co. vs. Walters (Col.), 89 Pac. at page 819.

City of Denver v. Sherret (C. C. A.), 88 Fed. at p. 233.

Duty of Electrical Companies.

"A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence *at places where others have a right to go* either for work, business or pleasure, to prevent injury."

Joyce on Electric Law, Sec. 445.

Croswell on Electricity, Sec. 234.

Elliott on Roads and Streets, Sec. 1071.

In the case of Thomas' Administrator v. Maysville Gas Co. (Ky.), 53 L. R. A. at p. 148, the Court said:

"That there was a duty imposed by law upon the Street Railway Company to keep its wires properly insulated so that those whose business or pleasure brought them in dangerous proximity to them might be protected from the deadly current which they conducted, cannot be questioned."

In the case of Thomas, by Next Friend v. City of Somerset (Ky.), 7 L. R. A. (N. S.) at p. 964, the Court said that:

"It was held by this Court in McLaughlin v. Electric Light Co. 100 Ky. 173, 34 L. R. A. 812, 38 S. W. 851, to be the duty of Electric Lighting Companies, or persons operating such plants, at points where people have the right to go for work or business, or pleasure,

to have the insulation or protection perfect; and for failure in this respect, they must respond in damages. This doctrine was followed in Schweitzer v. Citizens General Electric Co. 21 Ky. L. Rep. 608, 52 S. W. 830; Overall v. Louisville Electric Light Co. 20 Ky. L. Rep. 759, 47 S. W. 442; Owensboro v. York, 117, Ky. 294, 77 S. W. 1130; Lexington Ry. Co. v. Fain, 24 Ky. L. Rep. 1143, 71 S. W. 628."

See also Ryan vs. St. Louis Transit Co. (Mo.), 2 L. R. A. (N. S.), at p. 781.

Electrical companies are required to insulate wires at points where it may be *reasonably* anticipated that people may come in contact with them.

In Graves v. Washington W. P. Co. 87 Pac. at p. 958, the Supreme Court of Washington said, among other things:

"Respondent meets these contentions of appellant by the assertion of several propositions which we will consider seriatim. He urges first: 'The law imposes on persons manufacturing and dealing in or handling highly dangerous elements and substances such as electricity and dynamite, the duty of exercising the highest degree of care to protect persons from danger in all places where the general public may rightfully go for purposes of business or pleasure.' Accepting this as a correct statement of the law, let us apply it to the facts of this case. Can we say that 'the general public may rightfully go for purposes of business or pleasure', up or down the side of a high and almost perpendicular pier of a public bridge across a river, climbing upon the diagonally attached slats of steel as did respondent? Was it ever contemplated that such a use should be made of the piers of this bridge by the general public? We apprehend not. The bridge was constructed for the purpose of furnishing the public a means of crossing a goodly sized river. It was intended that the public should walk or ride upon the roadway at the top of said bridge. The lattice work upon the sides of these piers was not intended to con-

stitute ladders or furnish means of access to or from the top of the bridge. The public was not invited, nor expected to use such lattice work for such a purpose. * * *

"People who have occasion to use wires highly charged with electricity must be held to a high degree of care and when they plac ethose wires in close proximity to places or structures where other persons may rightfully go for business or pleasure, it is incumbent upon them to use a high degree of care to prevent any person from being injured by coming in contact therewith. * * *

"Ordinarily, a person whose duty it is to furnish protection to others against a dangerous agency, fully complies with the law when he provides such a protection as will safely guard against any contingency that is *reasonably* to be anticipated. He is not legally bound to safeguard against occurrences that cannot be reasonably expected or contemplated as likely to occur. Decker v. Stimson Mill Co. 31 Wash. 522; 72 Pac. 89; Johnston v. Great Northern Ry. Co. (Wash.) 84 Pac. 627; Daffron v. Majestic Laundry (Wash.) 82 Pac. 1090. * * *

"The carrying of dangerous electric wires upon high poles or the burying of them in trenches readily occurs to one as an appropriate requisite for the safety of people who may have occasion to come into the vicinity of said wires. But if a boy, through curiosity, should dig up a wire buried in the ground, or should climb to the top of a high pole, and in either case take hold of a live wire and be injured, would it be seriously contended that this was a circumstance which the owner of the wire should be held to have anticipated and guarded against? To be sure, it would be a *possible* contingency; but would it be so probable that any reasonably prudent person would feel it necessary to be guarded against? * * *

"As a matter of law, it may be said that a person of ordinary care and prudence, in the operation of an agency so dangerous as electricity, would and should be exceedingly careful and so arrange the means of handling and transmitting this powerful and mysterious element as to protect from harm any person or persons whom he might *reasonably* expect to be in a position to receive harm therefrom. But to say that

> the owner or operator of an electric plant should foresee and anticipate the presence of children or others in places where the ordinarily prudent, careful and foreseeing person would not expect, or deem it likely for them to be, would impose a burden and responsibility for which there is not justification in law."

In Gentzkow v. Portland Ry. Co. (Ore.), 102 Pac. at p. 616, it is said:

> "The defendant, employing in its business an agency so deadly and dangerous as electricity, is held to exercise the utmost degree of care in the construction, maintenance, inspection and repair of its wires so as to keep them harmless at places where persons are *liable* to come in contact with them. Perham v. Portland Electric Co. 33 Ore. 451, 53 Pac. 14, 24; 40 L. R. A. 799, 72 Am. St. Rep. 730."

In the case of Winegarner v. Edison Light & Power Co. (Kan.), 109 Pac. at p. 779, the Court quoted with approval from the instructions given to the jury by the lower court as follows:

> "You are further instructed that if under all the facts and circumstances in this case, you find that the defendant knew, or had sufficient and reasonable grounds to anticipate that persons might, while in the exercise of ordinary care for their own safety, come in contact with and be injured by any defective and dangerous wires it might operate and maintain at said place. * * * The company, however, which uses such a dangerous agent is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires and *liable* to come accidentally or otherwise in contact with them."

In Foley v. Northern California Power Co. (Cal. Court of App.), at p. 469, occurs the following:

> "The owner or operator of an electric plant is

> bound to exercise reasonable care in maintaining a system of inspection by which any change in the physical condition of any part of the plant, which would tend to increase the danger to persons lawfully in the pursuit of their business or pleasure may be reasonably discovered. Bourke v. Butte Electric and Power Co. et al., 33 Mont. 267; 83 Pac. 470. The care which the law exacts from any person, firm or corporation engaged in operating an instrumentality is always in proportion to the degree of danger *reasonably* to be apprehended from the means employed. Carroll v. Grande Ronde Electric Co. 47 Ore. 424, 84 Pac. 391, 6 L. R. A. (N. S.), 290."

In the case of Union Light, Heat & Power Co. v. Arnston (C. C. A.), 157 Fed. at p. 542, Judge Adams used the following language:

> "That the defendant should have fairly and reasonably anticipated that the basement which it had equipped with wires and lamps for lighting purposes would be occupied and used as it was and that Stone's agents, servants, and employes might from time to time be there is not debatable, and that defendant owed a duty to exercise a proper degree of care for their safety, is beyond question. If authority were necessary to sustain so plain a proposition, reference might be made to 1 Thompson on Negligence, Sec. 801, et seq., and to the cases there cited."

In Colusa-Parrot Mining and Smelting Co. v. Monahan (C. C. A. 9th Cir.), 162 Fed. at p. 279, the Court quotes with approval from the case of Lexington Ry. Co. v. Fains, Admr. (Ky.), 71 S. W. 629, as follows:

> "'The law applicable to this case has been well settled in Kentucky in several cases that have been brought to this Court for final adjudication. It is that those who manufacture or use electricity for private advantage must do so at their peril, and the only way to prevent accidents where a deadly current is used is

to have perfect protection at those points where people are likely to come in contact with it, citing McLaughlin v. Light Co. 100 Ky. 173, 37 S. W. 851; Schweitzer's Adm'r. v. Electric Co. (Ky.), 52 S. W. 830; Thomas' Adm'r. v. Gas Co. 112 Ky. 569, 66 S. W. 398; Macon v. Railway Co. 110 Ky. 680, 62 S. W. 496."

Continuing, Mr. Justice Ross said:

"In the present case it appears, as has been said, the plaintiff was a common laborer, knowing nothing of electrical work, and unfamiliar with the perils attending it. In sending him upon the roof to work the defendant was *bound* to know that he might come in contact with its wire. Newark Electric Light & Power Co. v. Garden, 78 Fed. 72, 23 C. C. A. 649, 37 L. R. A. 729. And it was bound by the plainest principles of law and justice to properly insulate its wire, to the end that those *likely* to come in contact with it should not be injured. Authorities, supra. See, also, Bourke v. Butte Electric Light & Power Co. 33 Mont. 267, 83 Pac. 470; Giffin v. United Electric Light Co. 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; Western Union Telegraph Co. v. McMullen, 58 N. J. Law, 155, 33 Atl. 384, 32 L. R. A. 352."

In Minnesota General Electric Co. v. Cronon (C. C. A. 8th Cir.), 166 Fed. at page 661, is the following:

"In Hector v. Boston Electric Light Co. 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 554, a lineman employed by a telephone company, for the purpose of affixing wires of the company to a standard erected on the roof of a building by the electric lighting company, had an implied license to reach the roof by going up through the building. But he used a different way, and, while unnecessarily upon the roof of an adjoining building, was injured by coming in contact with an uninsulated wire charged with electricity belonging to the electric lighting company. It was held that he was not entitled to recover. Field, C. J., observed

that: 'Whatever duty the defendant owed to the plaintiff as the servant of the telegraph and telephone company, under its license to that company to use the standard for the support of telegraph or telephone wires, this duty cannot be held to extend over the whole circuit of the defendant's wires, and the defendant was not required, for the protection of the servants of the telegraph and telephone company, to maintain an effectual insulation of its wires over other buildings than that on which the standard was placed, at places where the defendant had no reason to expect that the servants of that company would go in the performance of their duties in using its standard, and where the defendant had neither invited nor licensed them to go * * *."

"In Keefe vs. Narragansett Electric Lighting Co. 21 R. I. 575, 43 Atl. 542, the testimony showed that the plaintiff, a girl about eleven years of age, climbed out of the window of a house in which she lived onto the jet of the adjoining house. While so walking she came in contact with electric wires owned by the tenant of that building which were connected with defendant's wires for transmitting electricity in the houses. The Court said:

"'We do not think that the action can be maintained: first, because the wires by which the plaintiff was injured were not the wires of the defendant; and, secondly, even if they had been, we fail to see that the defendant would have owed any duty to the plaintiff since it could have had no reason *to anticipate* the act of the plaintiff in walking along the jet'."

In the case of Brush Electric Light & Power Company v. Lefevre (Tex. S. Ct.), 49 L. R. A., at page 773, is the following:

"There can be no liability for the injury in this case unless, from all the circumstances, the electric light company could reasonably expect that some person might be injured by its failure to cover the wires

placed by it upon the awning where the deceased received his injury. Texas & P. R. Co. v. Bigham, 90 Tex. 225, 38 S. W. 162. In the case cited, Chief Justice Gaines, on behalf of the court, expressed the rule in the following language: quoting from the Supreme Court of the United States in the case of Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256:

" 'But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' This is probably as accurate a statement of the doctrine as can be given, and is substantially that generally laid down by the authorities. Applying this rule to the facts of this case, the inquiry arises: Would an ordinarily prudent man, looking at the surroundings as they then appeared, have reasonably expected that any person would be upon the awning, and might be injured by coming in contact with the exposed wires? If such a consequence might have been reasonably foreseen, then the plaintiff in error would be liable for the injury, under the facts of this case, unless there be some other defense. If not, then it can not be held liable for the death of Paul Lefevre. If the testimony is such that a jury might have found that the electric light company ought to have anticipated the injury, then this Court can not inquire into the correctness of such a conclusion, although it might differ with the jury as to the correctness of the verdict. In the facts of this case there is not a scintilla of proof that the awning had been used by any person as a place of resort, either for pleasure or for business. Looking at the photographic views of the situation, the awning appears to be such as is common in the towns and cities as a protection to the front of the building, with no railing or other protection upon the top or roof showing the intention for persons to resort there for any purpose whatever. If a man of ordinary prudence had been placing the wires at the same points, the facts would not have notified him

> that probably someone would be injured by them. From the street and the sidewalk to the place where the exposed wires were located is a distance of about 16 feet, which must have been at least 10 feet above the heads of men of ordinary height passing along the street, and there were no means by which passers upon the street or sidewalk could come in contact with the wire. It was therefore not negligence, with regard to persons traveling along the street or sidewalk, to leave the wire exposed, because there was no reasonable, and scarcely a possible chance for such persons to be injured thereby. We are of opinion that there is no evidence upon which a jury could base a verdict in favor of the defendants in error, and the trial court erred in refusing to give the requested instruction to find for defendant'."

The Court will bear in mind the following facts: That this accident occurred a half mile from the town of Buhl on a country road traversing a new irrigation project known as the Twin Falls Carey Act Project, and that water was turned onto the lands in that vicinity for the first time in 1906; that before that time the land was covered with sagebrush (tr. pp. 42 and 30); that a little wheat was raised that year; that in 1907 the settlers raised a little grain and started on alfalfa, and in 1908 alfalfa and grain were raised (tr. pp. 42 and 43); that defendant's electric line was constructed in 1908; that there are no other hay-stackers in that vicinity of the dimensions of the one used by plaintiff (tr. pp. 28, 41 and 42); that it was made the size it was by plaintiff and Van Hoy in 1910 (tr. p. 47); and that no other person had been injured by coming in contact with the wires of defendant along that road either before or since plaintiff was hurt (tr. pp. 34 and 44).

We contend that plaintiff, in dragging that hay-stacker

along the road, was not required to have the long end of the boom (which came into contact with the wire (tr. pp. 27 and 30), in dangerous proximity to the wire, as it worked on a hinge and could be let down (tr. p. 50), and that under the foregoing facts and authorities the defendant could not reasonably anticipate that any person would travel along that road with any kind of a contrivance on which there would be a pole 27 feet and over in height and a horizontal pole about 40 feet in length, which latter would come in contact with its wires, hence, defendant was not required to insulate its wires.

We are not familiar with any rule of law that requires an electric company to insulate its wires to guard against injuries that might be sustained by the occupants of balloons and airships, and we do not know of any rule requiring such companies to insulate wires strung along outside of a country road at a height of over 27 feet.

No vehicle or means used in the ordinary modes of travel, of which we have any knowledge, could come in close proximity with defendant's wires. Loaded wagons, buggies, traction engines, automobiles, thrashing machines, bicycles, motorcycles, loaded hay wagons, etc., could pass in absolute safety.

Under the statutes of Idaho, electric wires strung across railroad tracks need be at a height of but 25 feet.

Rev. Codes, Sec. 1928.

We respectfully insist that the evidence wholly fails to show that defendant's electric line was not properly constructed in accordance with the standard fixed by electrical engineers, or that the injuries suffered by plaintiff were the result of any negligence on the part of defendant.

Third Assignment of Error.

This assignment of error relates to the holding of the lower court that plaintiff was chargeable with contributory negligence precluding his recovery.

Granting for the sake of argument that the defendant was negligent in not having its wires insulated, the question arises, was such negligence the proximate cause of the injuries suffered by plaintiff?

It is not contended that defendant wantonly or maliciously injured plaintiff.

The rule is so well settled as not to require the citation of authorities, that to constitute proximate cause creating liability for negligence, the injury must have been the natural and probable consequence of the negligent act, and one which in the light of attending circumstances, an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his negligence.

We earnestly contend, as above stated, that no ordinarily prudent man could reasonably foresee that any person would haul along a country road any kind of a vehicle or structure having an upright pole 27 feet 6 inches in length, and a horizontal pole about 40 feet long, which latter would extend far beyond the northerly boundary of the road and come into contact with an electric wire 27 feet and over above the ground.

That proposition appears to us to be too plain to admit of argument, and if we are correct in our view of the matter, the fact that the wire was not insulated was not the proximate cause of the injury, but the accident was directly attributable to plaintiff's negligent conduct, which

was the proximate cause of the injuries suffered by him, hence, his action could not be maintained.

Contributory Negligence.

It appears from the evidence that it was the long end of the boom that came in contact with the electric wire (Tr. pp. 27 and 30). When the turn was made to go up to the bridge the long end of the boom swung out over plaintiff's fence and under the electric light wires (Tr. p. 54). Defendant's Exhibit No. 2 shows that after the turn was made every foot the hay-stacker was dragged towards the bridge took the upright pole or mast further away from the defendant's wires.

As the mast did not come in contact with the electric wires it is unnecessary to consider any of the evidence concerning the taking of the stacker under the wires at a different point, when the boom was following the same direction as the mast, except to say that at no point did it touch the wires, and that it was taken under them but a few feet from a pole (Tr. pp. 53 and 54), where, as a matter of course, the wire was higher than at other points between poles because of the sag.

Plaintiff had resided on his ranch at the scene of the accident since 1906. He was there at the time the electric line was constructed, and the poles of defendant were practically against his fence. He saw the power line frequently as he was compelled to go under it in order to get into his place. He knew the wires were there, knew that they were charged with electricity, and that they were dangerous. He knew that the town of Buhl was lighted by electricity carried over those wires (Tr. pp. 46

and 48). He and Van Hoy remodeled the stacker in 1910 (Tr. p. 47) without having made any measurements for the purpose of ascertaining the height of the electric wires from the ground at any point along the line (tr. p. 48). The long end of the boom on the stacker works up and down in stacking operations by means of a rope on the butt end. The boom works on a hinge to accommodate itself to the different heights of the hay stacks, and across the top of it was a wire cable about a half inch thick. The boom was about 38 or 40 feet long. Twelve or 13 feet was on one side of the mast and the remainder on the other side. On the day of the accident plaintiff and his hired man hitched four horses on to the hay-stacker and dragged it up the road westerly toward the bridge. Plaintiff testified that "We pulled up to the bridge and I was driving the inside team next to the wire fence and was right up against the wire (Tr. p. 45). You have to hug the line to get on the bridge and you have to drive as close as you possibly can and the derrick just fits on the bridge nicely when you get it there. *We had to be very particular.* When you pull up to the bridge you have got to be particular not to get off to the south of the bridge. On the south end of the bridge it probably lacked 5 or 6 inches of being to the bridge, that is it did not get up to the bridge yet. It had not squared around. We were going to square the south end of the bridge and then we were going to drive my team on the bridge and square it and take it across. My team was over on the north side, but I stood on the south side. I did not have hold of the lines. The team I was driving was on the opposite side from where I was standing. I had gone over to the south side. I was traveling west and came up to this point and found

myself near the fence. I let loose of the lines and went over to the south side. The other man was standing on the bridge in front of the derrick. He had hold of his team by the heads. He was not guiding my team. My team would have to be quieted. * * * There were four horses abreast. I was driving one team and he the other. * * * At the time of the accident I was standing off to the side of the derrick. * * * I was facing north when I received the shock. Just before that I asked my man if he was all ready to pull, if everything was all right, and he said it was and at that I turned my head away from him, looked up and threw my hand up like that" (Tr. pp. 51 and 52). Plaintiff in error took hold of a manila rope, and the wire cable struck him on the arm. As he grabbed the rope there was a flash and the cable struck him, blinding him and rendering him speechless (Tr. p. 52). He could feel the electricity passing through him and could hear it popping. Moran released him from the cable and the horses ran away, the derrick knocking both plaintiff and Moran down and they were dragged by it to the north side of the bridge, where it tilted and released them (Tr. pp. 45 and 46). The boom was extending back when plaintiff swung the stacker around to cross the bridge, and when the turn was made the long end of the boom swung out under the electric wires. "I was not watching the boom as I went along the fence there. I was watching my team and couldn't very well watch my team and the boom too" (Tr. p. 54).

From plaintiff's testimony, which was uncontradicted, it plainly appears that the injuries suffered by him were the result of his own recklessness and utter disregard for his own safety. He left his team, which he stated would

have to be quieted, dropped the lines and went over to the south side of the derrick, the base of which was 14 feet square, paid no attention to the boom although he knew it was under the electric wires, which he knew were dangerous, and took hold of a rope attached to the butt end of the boom although he was aware of the fact that the long end was moved up and down by the butt end. Whether his unattended team or the hired man's team started and the sudden jerk caused the long end of the boom to come in contact with defendant's wires, or whether he voluntarily pulled the rope he took hold of on the butt end of the boom and thus caused the long end to touch the wires, or whether one of the teams started and caused him to involuntarily pull on the said rope and bring about the contact, cuts no figure. As the hay-stacker had remained stationary for some time, at least while he was moving from the north side of it to the south side, and questioning his man, without the boom touching the wires, it is a certainty that no contact would have occurred had not something happened to cause the boom to fly up. Had plaintiff lowered the boom on its hinge down alongside of the mast, or watched it while it was under the wire and kept it from coming near the wire by manipulating the butt end, as it was his duty to do, under the circumstances, the accident would not have happened. There was not only a want of ordinary care on the part of the plaintiff, but his lack of care was reckless in the extreme, and was the proximate cause of his injuries.

In Railroad v. Jones, 95 U. S. at page 442, it is said:

"One who by his negligence has brought an injury

upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such case is: 1. Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or, 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case, the plaintiff is entitled to recover. In the latter, he is not. Tuff v. Warman, 5 C. B. N. S. 573; Butterfield v. Forrester, 11 East, 58; Bridge v. Grand Junction R. Co., 3 M. & W. 244; Davis v. Mann, 10 Id. 546; Clayards v. Dethick, 12 Q. B. 439; Van Lien v. Scoville Manufacturing Co., 14 Abb. (N. Y.) Pr. N. S. 74; Ince v. East Boston Ferry, 106 Mass. 149. * * * The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down. Hickey v. Boston & Lowell R. Co. 14 Allen (Mass.), 429; Todd vs. Old Colony R. Co. 3 id. 18; s. c. 7 id. 207; Gavett v. M. & L. R. Co. 16 Gray (Mass.), 501; Lucas v. N. B. & T. R. Co. 6 id. 64; Ward vs. Railroad Co. 2 Abb. (N. Y.), Pr. U. S. 411; Galina & Chicago Union R. Co. v. Yarwood, 15 Ill. 468; Dogget v. Illinois Central R. Co. 34 Iowa, 284. The plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to direct the jury

to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse. Gavett v. M. & L. R. Co., supra; Merchants' Bank v. State Bank, 10 Wall. 604; Pleasants vs. Fant, 22 id. 121."

In Oregon Co. v. Roe (C. C. A. Ninth Cir.), 176 Fed. at page 718, it is said:

"Error is also assigned upon the refusal of the court to give the following instruction: 'Before the plaintiff in this action can recover, you must be satisfied that such injury as she may have received was received by her without any fault or negligence on her part; the rule of court in this state being that any negligence on the part of the plaintiff, however slight, directly contributing to the injury, is sufficient to bar the plaintiff's right of recovery.' The court gave the instruction as requested, but struck out the words 'However slight.' We find no error in the action of the court. * * * and that the charge to the jury guided them correctly as to the principles of law pertinent to the issues."

In Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. at page 393, Justice Field used the following language:

"That one cannot recover damages for an injury to the commission of which he had directly contributed, is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong."

In Chicago, R. I. & P. Ry. Co. v. Baldwin (C. C. A.), 164 Fed. at page 829, the Court said:

"In Missouri Pacific Ry. Co. v. Moseley, 57 Fed. 921, 925, 6 C. C. A. 641, 645, the plaintiff was overtaken and injured by an engine which came up be-

hind him while he was walking upon one railroad track and the roar of a train upon an adjoining track had rendered his hearing useless, and we held that this fact made the frequent and diligent use of his eyes to see what was coming behind him more imperative, and that as his view of the engine approaching behind him had been unobstructed, he was conclusively guilty of contributary negligence and could not recover. Under the common law one whose negligence directly contributed to his injury cannot recover damages of another whose negligence concurred to cause it. The negligence of the latter is no excuse for the contributory negligence of the former. Railroad Co. v. Houston, 95 U. S. 697, 702, 24 L. Ed. 542; Schofield vs. Railroad Co. 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Northern Pacific R. Co. v. Freeman, 174 U. S. 379, 383, 19 Sup. Ct. 763, 43 L. Ed. 1014; Blount v. Grand Trunk Ry. Co., 61 Fed. 375, 9 C. C. A. 526; Pyle v. Clark, 79 Fed. 744, 25 C. C. A. 190; Chicago & N. W. Ry. Co. v. Andrews, 130 Fed. 65, 73, 74. 64 C. C. A. 399, 407, 408; Garlich v. Northern Pacific R. C. 131 Fed. 837, 840, 67 C. C. A. 237, 240."

See also:

Winters v. B. & O. R. Co. (C. C. A.), 117 Fed. at p. 49.

Western Union Tel. Co. v. Baker (C. C. A.), 140 Fed. at p. 318.

29 Cyc. pp. 505-6-7, and mass of authorities cited.

As from the undisputed testimony of plaintiff himself it is clear that he acted without ordinary or any care or caution, and that the accident was attributable solely to his own reckless conduct, and as no fair-minded man could draw any other conclusion from the testimony, it was the duty of the lower court to grant the motion for nonsuit.

In Chicago, Rock Island & P. Ry. Co. vs. Baldwin (C. C. A.), 164 Fed. at page 829, occurs the following:

> "Where a diligent use of the senses by the person injured would have avoided a known or apprehended danger, a failure to use them is, under ordinary circumstances, contributory negligence; and, where such a failure is established by undisputed or conclusive evidence, it is the duty of the trial court to instruct the jury that there can be no recovery of damages on account of the injury. Railway Co. vs. Houston, 95 U. S. 697, 702, 24 L. Ed. 542; Schofield vs. Railroad Co. 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Southern Pacific Co. vs. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; Patton vs. Railroad Company, 179 U. S. 658, 660, 21 Sup. Ct. 275, 45 L. Ed. 361; Missouri Pac. Co. vs. Moseley, 57 Fed. 921, 925, 6 C. C. A. 641, 645; Chicago Great Western Ry. Co. vs. Roddy, 131 Fed. 712, 713, 65 C. C. A. 470, 471; Gilbert vs. Burlington & C. R. Ry. Co. 128 Fed. 529, 532, 533, 63 C. C. A. 27, 30, 31; Clark vs. Zarniko, 106 Fed. 607, 608, 45 C. C. A. 494, 496, and Chicago & N. W. Ry. Co. vs. Andrews, 130 Fed. 65, 73, 74, 64 C. C. A. 399, 407, 408; Western Union Tel. Co. vs. Baker, 140 Fed. 315, 319, 72 C. C. A. 87, 91."

In Cole vs. German Savings & Loan Society (C. C. A.), 124 Fed. at page 121, it is stated:

> "There is, however, always a preliminary question for the judge at the close of the evidence before a case can be submitted to the jury, and that question is, not whether or not there is any evidence, but whether or not there is any *substantial* evidence upon which a jury can properly render a verdict in favor of the party who produced it. Brady vs. Chicago & G. W. Ry. Co. 114 Fed. 100, 105, 52 C. C. A. 48, 52, 53, 57 L. R. A. 712; Railway Co. vs. Belliwith, 83 Fed. 437, 441, 28 C. C. A. 358, 362; Association vs. Wilson, 100 Fed. 368, 370, 40 C. C. A. 411, 413; Commissioners vs. Clark, 94 U. S. 278, 284, 24 L. Ed. 59; North Pennsylvania R. Co. vs. Commercial Nat. Bank, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. Ed. 287; Railway

Co. vs. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Laclede vs. Fire Brick Mfg. Co. vs. Hartford Steam Boiler Inspection & Ins. Co. 60 Fed. 351, 354, 9 C. C. A. 1, 4; Gowen vs. Harley, 56 Fed. 973, 6 C. C. A. 190; Motey vs. Granite Co. 74 Fed. 155, 157, 20 C. C. A. 366, 368. The burden of proof is upon the plaintiff in an action for personal injury to establish the fact that the acts of negligence of which he complains were the proximate cause of the injury suffered, and if, at the close of the testimony in a trial for personal injury, there is no *substantial* evidence upon which a jury can properly find that the negligence charged was the proximate cause of the hurt sustained, it is the duty of the Court, as it is in a like condition of the evidence in the trial of every other issue of fact, to instruct the jury to return a verdict for the defendant. Railroad Co. vs. Elliott, 55 Fed. 949, 954, 5 C. C. A. 347, 352; Railroad Company vs. Reeves, 10 Wall. 176, 19 L. Ed. 909; Scheffer vs. Railroad Co. 105 U. S. 249, 252, 26 L. Ed. 1070; Jenks vs. Inhabitants of Wilbraham, 11 Gray, 142; Durham vs. Musselman, 2 Blackf. 96, 18 Am. Dec. 133; Morrison vs. Davis, 20 Pa. 171, 57 Am. Dec. 695; Denny vs. Railroad Co. 13 Gray, 481, 74 Am. Dec. 645; Dubuque Wood & Coal Assn. vs. County of Dubuque, 30 Iowa, 176; Hoag vs. Railroad Co. 85 Pa. 293, 298, 299, 27 Am. Rep. 653; West Mahanoy Tp. vs. Watson, 112 Pa. 574, 3 Atl. 866; Read vs. Nichols, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130; Railroad Co. vs. Mutch (Ala.) 11 So. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179."

In Missouri Pacific Ry. Co. vs. Moseley (C. C. A.), 57 Fed. at page 922, the Court said:

"Where contributory negligence is established by the uncontroverted facts of the case, it is the duty of the trial court to instruct the jury that the plaintiff can not recover. Railroad Co. vs. Houston, 95 U. S. 697; Donaldson vs. Railroad Co. 21 Minn. 293; Brown vs. Railroad Co. 22 Minn. 165; Smith vs. Railroad Co. 26 Minn. 419, 4 N. W. 782; Lenix vs. Railway Co. 76 Mo. 86; Railway Co. vs. Dick (Ky.) 15

S. W. 665, 666; Schofield vs. Railway Co. 114 U. S. 615, 5 Sup. Ct. Rep. 1125; Aerkfetz vs. Humphreys, 145 U. S. 418, 420, 12 Sup. Ct. Rep. 835; Powell vs. Railway Co. 76 Mo. 80; Yancey vs. Railway Co. 93 Mo. 433, 438, 6 S. W. 272; Kellogg vs. Railroad Co. 75 Mo. 138; Bell vs. Railroad Co. 72 Mo. 50; Turner vs. Railroad Co. 74 Mo. 602; Dlauhi vs. Railway Co. 105 Mo. 645, 654, 658, 16 S. W. 281."

In Goodlander Mill Co. v. Standard Oil Co. (C. C. A.), 63 Fed. at page 401, Judge Jenkins used the following language:

"Without doubt, whether a given act or omission is the proximate cause of an injury is ordinarily a question for a jury. Railway Co. v. Kellogg, 94 U. S. 469. This, however, is subject to the well-settled rule that the court should withdraw a case from the jury, and direct a verdict, when the undisputed evidence is so conclusive that the court should set aside a verdict in opposition thereto. North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 733, 8 Sup. Ct. 266; Railroad Co. v. Converse, 139 U. S. 469, 472, 11 Sup. Ct. 569; Elliott v. Ry. Co., 150 U. S. 245, 14 Sup. Ct. 85; Railway Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619."

In Western Union Tel. Co. v. Baker (C. C. A.), 140 Fed. at page 319, Judge Sanborn used the following language:

"It is said that the question of the negligence of the plaintiff in this case was for the jury, and it is true that where there is a *serious conflict* of evidence, or where grave doubts arise what deductions of fact should be drawn from it, the question of contributory negligence, like other questions, is for the determination of the jury. But if, at the close of the trial, the evidence so clearly discloses the fact that the plaintiff was guilty of negligence which directly contributed to his injury, that a finding to the contrary could not be sustained, it is the duty of the trial court to

instruct the jury to return a verdict for the defendant. There is always a preliminary question for the judge before any case can be properly submitted to the jury, and it is, not whether or not there is any evidence, but whether or not there is any *substantial evidence*, upon which a jury may properly render a verdict in favor of one of the parties to the action. If there is no such evidence, it is the duty of the court to direct the jury to render a verdict against him. This duty is imposed upon the court in every case where the evidence and the rational deductions from it are undisputed, or of such a conclusive character that the exercise of a sound judicial discretion would compel a refusal to give effect to a contrary verdict. Southern Pac. Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; Patton v. Texas & Pac. R. Co., 179 U. S. 658, 660, 21 Sup. Ct. 275, 45 L. Ed. 361; Chicago G. W. Ry. Co. v. Roddy, 65 C. C. A. 470, 471, 131 Fed. 712, 713; Gilbert v. Burlington C. R. & N. R. Co., 63 C. C. A. 27, 30, 31, 128 Fed. 529, 532; Clark v. Zarniko, 45 C. C. A. 494, 496, 106 Fed. 607, 608."

Concerning the duty of the trial court to take a case from a jury, Mr. Justice Brewer, in Patton vs. Texas & Pacific Ry. Co. 179 U. S. at page 660, uses the following language:

"At the same time the Judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to a jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

See also—

Swords vs. Page (C. C. A.), 174 Fed. at p. 919.

Use of Streets and Highways.

> "The use of the streets for the purpose of moving a building along the surface thereof is not within the use of streets for purposes of ordinary travel. It is, however, an extraordinary and exceptional use in opposition to the primary uses of the streets."
>
> Joyce, Electric Law, Sec. 481.

In said section, the case of Dickson vs. Kewanee, Etc. Co. 53 Ill. App. 379, is cited, holding it proper to instruct the jury "that the company had a right to place its wires in the street, if allowed by corporate authority, if it did not interfere with the ordinary use of the public in the streets, and that removing a house along the streets was not within the rights enjoyable by the public as a use of the streets." And there is also cited Northwestern Telephone Exchange Co. vs. Anderson (N. D.), 98 N. W. 709, wherein it was said:

> "The use of the streets for moving houses is not, however, a use but is rather an extraordinary one. It does not pertain to the primary right to the use of the streets for travel or other public purpose. The public derives no benefit therefrom generally. Such extraordinary use of the street may, however, be permitted as a use, under restrictions safeguarding the rights of the public to the street in certain cases, as necessity may require."

Moving houses along a public highway is not an ordinary use and is not within the right which is enjoyable by the public in such highway. New York & New Jersey Telephone Co. vs. Dexheimer, 14 N. J. Law J. 295; Toledo B. G. & S. Traction Co. vs. Sterling, 29 Ohio, C. C. 227.

In Ft. Madison St. R. Co. v. Hughes (Iowa), 14 L. R. A. (N. S.), at page 451, the Court said:

"But, where the use of the street has been lawfully appropriated in so far as essential for the operation thereof of an electric street railway company, one of the modern conveniences of travel and transportation, there is no tenable ground for demanding that its operation shall cease or be unduly interfered with, or that the value of its franchise shall be impaired, or its property destroyed, to enable another to make an unusual and extraordinary use of the street in the moving of houses or other structures over it. This would be inconsistent with the franchise granted to which the street has become subject. The rights of the defendants to the use of the street were limited by those of the company to operate its cars thereon and they could not insist upon the elimination of its franchise rights in order to give way to them over the road in moving the house. In other words, the defendants had the right to the use of the street as it was, with the trolley line in operation, and not as it would have been had no franchise been granted by the City of Ft. Madison; and, as they could not move the house lengthwise on the street as they intended without occupying the company's track, destroying the trolly line, and interrupting for a considerable time the operation of its cars, the jury were rightly instructed that they were not entitled to take the house into that street. As directly in point, see Milville Traction Co. v. Goodwin, 53 N. J. Eq. 448, 32 Atl. 263; Williams v. Citizens R. Co., 130 Ind. 71, 15 L. R. A. 64, 29 N. E. 408; Dickson v. Kewanee Elec. Light & Motor Co., 53 Ill. App. 379; Croswell, Electricity, Sec. 259; 1 Joyce, Electric Law, Sec. 481; Roads and Streets, 578. See for a valuable discussion of the subject, Northwestern Telephone Exchange Co. v. Anderson, 12 N. D. 585, 65 L. R. A. 771, 98 N. W. 706. In Williams v. Citizens R. Co., supra, in deciding a like question: 'The purpose for which highways are laid out and dedicated is that of travel in the usual modes. It would be strange indeed, if large buildings could be moved along the thronged streets of a city without control or restriction and it would be equally strange if the owner of a building could destroy the property

> of others in order to enable him to move his building from one place to another'."

When a telegraph company has placed its poles at a sufficient distance from the traveled portion of a highway to be safe from collision with vehicles passing along it under ordinary circumstances, it is not liable for damages resulting from an accident arising from the breaking and fall of one of the poles when the proximate cause of the breaking and fall thereof was a collision with a runaway team of horses and the wagon to which they were attached.

Allen v. Atl. & Pac. Tel. Co. 21 Hun. (N. Y.), 22.

In Edison Elect. L. & P. Co. v. Blomquist, 185 Fed., 615, a bill was filed to, among other things, restrain defendant, a licensed house mover, from interfering with the wires of complainant in the streets of St. Paul, and after an exhaustive examination of authorities, the Court said:

> "After a somewhat careful examination of the case in all its bearings, and of the authorities which have been cited on both sides, I can come to no other conclusion than that the occupation of a public street by a house that is being moved is similar in its nature to the occupation of a street by a deposit of building material. Both are obstructions to the street; both are done under the permission of the city council; both can be prohibited by the city council. In my judgment both are for the *private* benefit of the person in whose favor they are allowed. Neither one is for a *public* purpose, and, consequently, any ordinance of the city requiring the complainants to incur expense or pay out money, to allow the removal of a house, would appropriate their property for a private purpose, and would be unlawful." Temporary injunction granted.

In the case at bar it is admitted that defendant is sup-

plying a large number of people with electricity for lighting, power, and other purposes. It will be remembered that when the defendant constructed its line in 1908, through that newly settled country, there was but a comparatively small quantity of hay being raised, consequently there was but little use for stackers, and even at the time of the accident there were no other stackers in that vicinity of the size of plaintiff's (tr. pp. 28, 41 and 42). Suppose that the stackers built next year should be 35 feet high, the next year 40 feet and the next year 50 feet. It certainly would not be contended that the hauling of a few of such stackers along that road would be such an ordinary use of the highway as to require defendant to reconstruct its line each year at great expense and to the great detriment of large numbers of people depending on it for light and power.

In conclusion we will say that in any view that may be taken of the testimony of Freedhein and plaintiff's other witnesses, plaintiff utterly failed to show negligence on the part of defendant in the construction or maintenance of its electric line, or any negligence on defendant's part, and the burden was upon him so to do. The testimony of plaintiff himself shows conclusively that his injuries were occasioned by his own reckless conduct.

We contend, therefore, that it was the duty of the lower court to grant the motion for non-suit, that there are no errors in the record, and that the judgment should be affirmed.

Respectfully submitted,

S. H. HAYS,

J. F. NUGENT,

Attorneys for Defendant in Error.

In the United States
Circuit Court of Appeals
For the Ninth District

JAKE M. SHANK, Plaintiff in Error,

vs.

THE GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY,
Defendant in Error.

Petition for Rehearing
by Defendant in Error

S. H. HAYS,
JOHN F. NUGENT,
Attorneys for Defendant in Error.

The Court is requested to grant a rehearing in the above cause.

Defendant in error suggests that there has been:

1st. A misapprehension as to the record in the case.

2nd. That owing to such misapprehension, an erroneous conclusion has been reached.

a. The evidence shows without dispute that the pole line was constructed and the wires placed according to the accepted standards of the locality. Paragraph 5 of the statement of what the evidence tended to prove contained in the opinion is therefore erroneous.

b. There was no evidence whatever of any other hay-stacker of this *height* being upon the highway at any time. Others of similar design were testified to. The matter of height under the opinion of the Court is material.

c. After the building of the pole line the plaintiff remodeled this stacker to make it go under the wires. He "had been told" the wires were 30 feet high but did not measure them. This particular place was in front of his own farm where the wires were plainly visible.

d. He had charge of the stacker and ran it into the wires without care or caution. He should have used the same care at least as at a railroad crossing.

The conditions surrounding the power industry in Idaho were well understood by the trial court.

Electricity is conducted by means of pole lines to the small towns in the sagebrush districts of Idaho.

Steel tower lines such as conduct power to the great cities of the coast are unknown in Idaho and could not be used to connect our small towns with their limited market for power.

Poles must be used for carrying the wires. The height of poles that can be used is limited by the danger from winds and the height of the trees from which the poles are cut.

Hundreds of people must of necessity use electricity. Every time a hay stacker is run against a power line, the users of the power in many lines of work are put in danger.

It is a matter of general knowledge that high voltage lines are impossible of insulation.

These pole lines are suitable for the localities in which they are built and there is no structure other than stackers which can be found on the highways in this district, not excepting the smaller houses, which can not be readily moved under wires twenty-seven (27) feet from the ground.

The locality where the accident occurred was newly reclaimed from its desert character. In 1906, water was first turned on. In 1907, the raising of alfalfa commenced, and in 1908, about half the country was in cultivation. The accident occurred in August, 1910.

The record is in some respects fragmentary, but it appears from the testimony of the witness Chamberlain (pp. 42-43) that the country was new; that for this reason, people borrowed stackers belonging to their neighbors; that for this reason, they were sometimes hauled along the roads and that as the country got older, more and more people owned their own stackers.

The stacker was not on wheels, but the timbers were sloped at the ends so it could be moved (Testimony of Shank, p. 49). Necessarily, its field of action, so far as movement was concerned, was limited.

In this new country the settlers were borrowing each others tools and implements until their farms were better developed, so that the movement of stackers from one place to another was largely a temporary matter.

In agricultural districts where the nature of farming operations is well understood and the use and purpose of stackers, it is held that the courts will take judicial notice that hay stackers are not generally hauled over highways.

Mayhew vs. Yakima Power Co. 130 Pac. 485.

Defendant was in lawful occupation of the highway (Sec. 2837 Rev. Codes, Idaho Laws 1903, p. 343) and it is not claimed that it has not complied with the law or the regulations of the county authorities.

The laws of Idaho recognize the unusual height of railroad trains and that a man standing on a freight car is not unusual, also that power lines cross railroad tracks and therefore it is provided by statute that wires over railroad tracks shall be at a height of twenty-five feet. This is the only statutory provision as to the height of wires.

a. In the opinion there are nine paragraphs stating what the evidence tended to show.

Paragraph five is as follows:

> "5. That the standard of construction of such a power line in that country, recognized by engineers and others in charge of construction, carried the lowest transmission wire from thirty to thirty-three feet from the ground."

This we think is an inaccurate statement of the record. The witness Freedhein is the only one on this point. Page 36 he says:

> "A pole seven inches in diameter at the top and forty feet long is a suitable pole for all voltages across such a country as the one here in question. It is practically a level country. All the variations in the surface are small undulations."

~~Bottom~~ Page 38:

> "I think a forty foot pole is standard and I would put it about eight feet in the ground. There are three wires strung on these poles, one on top and two at the sides of the arm, these are on the cross-arm. It is the general, usual and standard form of construction so far as the wires are concerned."

Standard construction is then a forty foot pole set eight feet in the ground. In other words, a pole extending thirty-two feet above the surface of the ground.

Freedhein further says (bottom p. 38):

> "The lower wires on high voltage from 22,000 to 23,000 would be put about eighty inches to forty or sixty inches, or seventy-two inches apart, and in good construction, the wire on the top is about the distance from these other wires as they are apart."

The cross-arm would then carry the wires eighty inches apart and the wires on the cross-arm should be about the same distance from the top wire.

This would bring the cross-arm 5.76 feet below the top of the pole, or 26.24 feet above the ground. The insulators would add a distance of twelve or fourteen inches (bottom p. 39), making the height of the wire under standard construction 27.24 or 27.40 feet above the ground. These measurements are at the pole and not on the sag of the wire between poles. The Court will take judicial notice that wires sag, also that they must sag to take up expansion and contraction due to changes in temperature.

The wires at the point of accident were twenty-seven feet three inches above the ground and were, therefore, standard construction.

The statement of the Court in paragraph five above quoted would be to the effect that the construction was not standard. We think the record shows that it was standard.

The fact that the witness testified that other distances might also be standard is immaterial because he was called to show that our construction was not standard.

b. The opinion states that the top of the mast came in contact with the wire (Opinion p. 3).

We respectfully point out that it was the wire over the long end of the boom of the stacker and that as we view it this is undisputed (pp. 27 and 30). The stacker was being hauled *away* from the wires and onto the bridge. (Defts. Ex. 2). The long end of the boom was under the wires when the turn was made to go up to the bridge (p. 54). The pole line was against the fence (p. 48). At the place of accident plaintiff found himself "right up to" his fence. (p. 48). He found himself "near" the fence, left his team and went to the other side of the haystacker (bottom p. 51).

The base of the stacker was 14 feet square with the mast in the center (bottom p. 48). It was in the road and was being pulled onto the bridge and away from the wires. The mast was perpendicular. (Middle p. 55).

Plaintiff was between the stacker and the fence when the stacker stopped and plaintiff went over to the south side of the stacker. Hence the stacker was in the road and not touching the fence and the mast in the middle of the stacker was at a distance of more than seven feet at all times from the fence. It had been pulled away from the fence and up to the bridge. Hence the mast could not have touched the wires. The boom which was a movable affair was under the wires (p. 54).

The uncontradicted testimony shows that hay stackers similar in design to the one in question were in use but that none were of the same height.

As it seems to be held that the company should keep its wires above the height of hay stackers this point becomes material.

One hay stacker of another type—rigid—not moved along the roads, had a mast in the neighborhood of thirty feet in height but of this type used by plaintiff the mast

is usually 20 or 25 feet (p. 44). The Sommer's stacker was 25 feet, Greshaver and Hopson 20 feet, Metham 20 odd feet, Hatfield and Bowers 20 feet and better (p. 28). All the evidence on this point will be found on pages 27, 28, 29, 30, 33, 34, 41, 42, 43, 44 and 47 of the record. Plaintiff had not moved this stacker along a road before (p. 53). There is no evidence that there was any other stacker than this of so great a height moved along the road or under the wires.

Plaintiff had no notice of the height of this stacker and could not be charged with notice of the moving of smaller stackers in such a way as to affect this case.

c. The stacker in question after the building of the power line was remodeled by plaintiff for the purpose of fixing it so it would go under the wires as plaintiff "had been told" the wires were 30 feet above the ground (p. 47), but he did not take the trouble to measure them (p. 48) or to better inform himself. When plaintiff undertook to remodel the stacker for this special purpose he became the acting party and was bound to use due care.

d. We believe under the circumstances that contributory negligence has been conclusively so shown as to become a matter of law.

The accident occurred as follows:

1. On a clear, dry August day when the wires could be plainly seen (p. 26).

2. Plaintiff was well aware of the location of the wires immediately in front of his farm (top p. 48), and knew they carried a dangerous current of electricity and that the wire sagged between the poles (p. 48).

3. Plaintiff helped to remodel the stacker before the accident in 1910, and built it between twenty-seven and

twenty-eight feet high. He "had been told" (middle p. 47) that the wires were thirty (30) feet above the ground, but he never made any measurements (bottom p. 48).

4. Plaintiff knew that the wires sagged between the poles and that he had allowed only two to three feet clearance. He knew that the sag in the wire and undulations in the surface of the ground would bring the top of the stacker close to or above the wires. That the bridge was higher than the surrounding ground, he could see and knew.

5. Knowing all of these facts and fully understanding the danger, he drove the stacker under and in close proximity to the wires without watching to see whether the stacker was in a safe position or not (middle p. 54). In other words, he drove his stacker against the wires without any care or caution whatever, well knowing the danger. Whether the stacker should come in contact with the wires or not was a matter over which plaintiff had control. The moving structure was in his charge.

The danger was more obvious than a train of cars moving at high speed at a railroad crossing.

Failure to use care and be watchful at a railroad crossing is contributory negligence as a matter of law.

Pyle vs. Clark, 79 Fed. 744.

Hart vs. N. P. Ry. Co., 196 Fed. 180.

Blackburn vs. Southern Pac. Co., 34 Or. 215 (55 Pac. 225).

Woolf vs. Wash. Ry. & Nav. Co., 37 Wash 491 (79 Pac. 997).

The duty of a person at a railway crossing seems well settled.

How much clearer is the duty when within two or three

feet of a dangerous current of electricity the presence of which is known to the party.

In conclusion we say:

1. The construction of the pole line and the stringing of the wires was standard construction.

2. There was no other stacker in that locality so high. Notice of smaller stackers would not be notice of this stacker which was remodeled after the line was built.

The movable boom, not the mast, struck the wire.

3. The plaintiff was guilty of contributory negligence as a matter of law.

Where persons are in control of structures which they are moving in proximity to electric wires which they know to be dangerous, they must at least use the same care incumbent on a person crossing a railroad track.

Respectfully submitted,

S. H. HAYS,

Of Counsel.

(*Certificate.*)

I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

S. H. HAYS,

Of Counsel for Defendant in Error and Petitioner for Rehearing.